

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ELCA NO 37 OF 2024

EDWARD

MANG'OMBE.....APPELLANT VERSUS
EUNICE RAPANDO.....1st
RESPONDENT
WOMEN AND ORPHANS OF RURAL KENYA.....2nd
RESPONDENT

**(An appeal arising from the proceedings and ruling of
Webuye Senior Principal Magistrate Hon. Viola Yator
delivered on 10th July,2024 in WEBUYE SPMCC NO E168 of
2023).**

JUDGMENT

1. The subject of this appeal emanates from a ruling rendered by the Hon. Viola Yator on various applications dated 20/11/2023, 19/12/2023 and 18/04/2024. In the former suit, the Appellant was the Plaintiff and the Respondents were the Defendants.

2. The application dated 20/11/2023 was filed by Appellant wherein he sought for a temporary injunction against the Respondents from taking over the operation of St. Bakhita Mission Health Facility and making unilateral management changes without complying with the Law and Legal instruments creating the facility and for the 1st Respondent to be restrained

from entering and remaining on the facility and terminating contracts of workers without any authority and due process and for leave to serve the court process by email upon the 2nd Respondent.

3. The application dated 19/12/2023 was filed by the Respondents where they sought for temporary injunction orders pending hearing and determination of the application and the main suit against the Appellant and his agents restraining him from causing disruptions and/or interfering with the lawful running of St. Bakhita Mission Health Facility.

4. The third application dated 18/04/2024 was filed by the Appellant seeking to cite the Respondents for contempt for disobeying court orders issued on 29/11/2023

5. The applications were agreed to be canvassed by way of written submissions and the matter was subsequently reserved for ruling and in the impugned decision, the learned trial magistrate resolved that status quo be maintained allowing the Respondents to continue running the facility pending determination of the main suit.

Appeal to this court.

6. The above outcome did not augur well with the Appellant and dissatisfied with the impugned ruling, the appellant preferred the current appeal to this court on 11 grounds as set out in his memorandum of appeal dated 13/08/2024 seeking to

have the appeal allowed and remitted to an independent and unbiased court for hearing and final disposal. The other prayer sought was spent since this is a determination of the appeal. The grounds of appeal were set out as follows;

- a) The learned trial magistrate erred in law in determining the notice of motion for contempt dated 18th April, 2024 on extraneous matters not before her and hence falling into grave error.**
- b) THAT the trial magistrate failed to entertain the appellant's motion and instead discharged injunctive orders issued on 29th November, 2023 when there was no application before her seeking discharge/variation of the aforesaid order and in the face of contempt proceedings before her for determination.**
- c) THAT the trial magistrate erred in law and fact in considering a motion by the defendant /respondent dated 19th December, 2023 seeking temporary injunction when the aforesaid motion had not been served upon the appellant and was not listed before her for hearing hence prejudicing the appellant as the aforesaid motion had not been served and set down for hearing hence prejudicing the appellants position and not creating a level playing ground in the manner she conducted her proceedings and breached cardinal**

civil procedure rules as to hearing of matters before her court.

- d) THAT the trial magistrate erred in law in giving audience to the respondent in express contravention of legal precedent that bars a party in contempt from being heard unless they purge the contempt of court in issue.**
- e) THAT the learned trial magistrate erred in law in considering the pleadings and submissions in contempt by the respondent when the same had not been served on the appellant hence falling into error as there was no level playing field and hence prejudicing the appellant.**
- f) THAT the learned trial magistrate erred and digressed in determining a motion that was not listed before her and making orders without any submission and evidence before her and failing to make a determination on the motion for contempt that was properly before her for determination.**
- g) THAT the trial magistrate erred in law by forcing/compelling the parties to go for mediation in the face of contempt and failure by the respondent to file their pleadings - 10 within allowed timelines and failure to hold that there were no issues to be submitted for mediation when there were no issue to**

be submitted for mediation and hence falling into error.

- h) **THAT** the trial court was in error in holding that mediation took precedence when there was no material before it to submit the dispute for mediation and obvious breach of a court order as contempt as it goes to the root of proceedings and administration of justice and the court ought to punish for contempt the dispute before it.
- i) The trial court erred in law in enforcing its orders and enforcing the law on contempt of court.
- j) **THAT** the trial court erred in law in ordering the suit be fixed for hearing when the respondent had not filed a defence to the suit for over 6 months since being served and had declined to enter an interlocutory judgment against the respondent despite clear evidence of service and an application for interlocutory judgment dated 15th March, 2024 on record but chose to close its eyes on it hence falling into error.
- k) **THAT** the trial magistrate fell into error by conducting the proceedings herein in a biased manner contrary to the provisions of the Civil Procedure Act and Rules and ought to be barred from conducting or hearing this suit before her and the same should be heard before an independent court without any basis.

Issues for determination.

7. As was stated in the case of **Abok James Odera t/a A. J Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**, this court is alive that its role as a first appellate court is to re-evaluate, re-assess and re-analyze the record and then determine whether the conclusions reached by the learned trial magistrate stand or not and give reasons either way.

8. Turning to the matter at hand, I have carefully considered the records, provisions of law relied upon, and judicial precedents cited and in my considered view, the single issue for determination is whether the trial court erred in its decision.

9. It is imperative for this court to note that the applications leading to the impugned application were filed concurrently as interim applications even before directions were taken for the suit. The Appellants major concerns in the appeal revolved on grounds that the trial court overlooked or vacated orders it had previously issued and that the Appellant had filed an application to cite the Respondents for contempt of the resultant orders, that the court determined applications which had not been slated for hearing and for issuing directions for the main suit to be heard. This court has agonized with the trial court's findings in the impugned ruling and the grounds of appeal.

10. It is trite Law that a Court bears a cardinal duty to uphold and give effect to the overriding objective, commonly referred to as the *Oxygen Principles*, as enshrined under Sections 1A and 1B of the Civil Procedure Act and Article 159(2)(d) of the Constitution of Kenya. These provisions mandate courts to administer justice in a manner that is just, expeditious, proportionate, and affordable, while eschewing undue regard to procedural technicalities. The Oxygen Principles were introduced to breathe life into the judicial process by shifting focus from rigid adherence to form and procedure to the substantive ends of justice. In discharging its mandate, the Court must therefore balance procedural fairness with the need to facilitate the efficient and timely resolution of disputes.

11. It is incumbent upon both the Court and litigants to assist in achieving this overriding objective by ensuring that litigation is conducted in good faith and without unnecessary delay or expense. Consequently, where procedural lapses do not occasion prejudice or injustice, the Court is enjoined to overlook such defects and determine matters on their merits, thereby upholding the spirit and purpose of the Oxygen Principles.

12. Further, under Kenyan law, the Court's power to refer matters to mediation is both statutory and constitutional. Article 159(2)(c) of the Constitution of Kenya, 2010 recognizes alternative forms of dispute resolution mechanisms (ADR), including reconciliation, mediation, arbitration, and traditional

dispute resolution mechanisms, as valid and complementary means of achieving justice. This constitutional imperative is given effect through statutory provisions and procedural rules. See the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR.**

13.Section **59B of the Civil Procedure Act (Cap. 21)** empowers courts to refer civil disputes for mediation. The **Civil Procedure (Court-Annexed Mediation) Rules, 2022** operationalize this provision by setting out the framework for court-annexed mediation. Rule 5(1) empowers the court, either on its own motion or upon the request of the parties, to refer a matter to mediation if it considers the case suitable for such resolution. This Court's mandate is to be exercised judiciously and within the confines of suitability and consent.

14.In essence, the Court's mandate to refer matters to mediation extends to all civil disputes suitable for consensual settlement, subject to the law and the parties' willingness. From the record, I do not see any oral submissions or written protest by either of the parties objecting to the proposed mediation. Moreover, it is my considered view that given the nature of the claim which involves a health facility used by members of the public, a referral to mediation was not misplaced but was aimed to promote efficient, just, and participatory justice.

15. As for the issue raised that the trial court fixed a date for hearing and the assertion that the Respondents have not filed their defence despite the passage of time. I note from the proceedings that the Appellants on 07/08/2024 acknowledged receipt of a defence and the matter was fixed for pre-trial directions by the Appellant. I therefore find this claim to be misinformed.

16. The record shows that the application by the Appellant dated 20/11/2023, filed contemporaneously with the plaint, sought, *inter alia*, temporary injunctive orders against the Respondents. When the said application was first placed before the trial court, and upon consideration of the material then before it, the court granted the temporary orders sought on an interim basis. Subsequently, and before the determination of the said application, the Respondent filed another application dated 19/12/2023, similarly seeking temporary injunctive orders this time against the Appellant.

17. Upon close examination of the two applications, their grounds, and the nature of the orders sought, it is apparent that the applications were in direct competition with each other, each party asserting rights over the same subject matter. The Applicant claimed to be the founder of the hospital in dispute, while the Respondent asserted ownership of the same facility.

18. Under **Order 40 Rule 7 of the Civil Procedure Rules**, the law provides that ***“any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”*** In the present case, however, the trial court, having been confronted with competing claims and conflicting evidence from both sides, exercised its inherent powers to discharge the interim orders *suo moto*. In my considered view, the court did so not in derogation of the express provisions of the law, but in furtherance of the ends of justice and in the proper exercise of judicial discretion. The court was evidently motivated by the need to preserve fairness and balance between the parties pending a full hearing. Indeed, the court’s goodwill and commitment to justice is manifest in its subsequent directive that the main suit be heard and determined on a priority basis, thereby ensuring that the substantive issues in dispute would be resolved expeditiously and on their merits.

19. The upshot of my findings is that this Appeal lacks merit. The same fails and is hereby dismissed with costs to the Respondent.

DATED, SIGNED and DELIVERED at **BUNGOMA** this 27th day of November, 2025.

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HON.E.C CHERONO
ELC JUDGE

In the presence of;

1. M/S Mtunda h/b Mr. Masinde for the Appellant.
2. M/S Mukami H/B for Mwira for the Respondents.
3. Bett C/A.