

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
KAKAMEGA
ELC APPEAL NO. E030 OF 2024

PETER KHALUMI MAINA.....
APPELLANT

VERSUS

MAUREEN MALESI
ABUTI.....RESPONDENT

***(Being an appeal against the ruling of Hon. J.R. Ndururi,
(SPM) delivered on 13th June 2024 in Kakamega CMCELC
Case No. 14 of 2020)***

JUDGMENT

Introduction

1. The appeal before this court was filed by Peter Maina Khalumi challenging the ruling of Hon. J.R Ndururi (Senior Principal Magistrate) delivered on 13th June 2024 in Kakamega Chief Magistrates Court ELC Case No. 14 of 2020. In the impugned ruling, the learned trial Magistrate

dismissed the appellant's application dated 18th September 2023, wherein the appellant sought leave to re-open his case to allow the filing of additional witness statements and further evidence before the defence case commenced. The appellant being dissatisfied with the court's refusal to exercise discretion in his favor, lodged the present appeal.

Background

2. By an amended plaint dated 2nd December 2020, the appellant (Plaintiff) instituted a claim for specific performance arising from a land sale agreement allegedly entered into on 17th April 2019 between himself and the respondent for the purchase of a portion of land measuring approximately 0.10 hectares, initially comprised in L.R. BUTSOTSO/SHIKOTI/1261, registered in the name of the respondent's late father, Ernest Maina Omwera.
3. Upon several mentions for compliance with Order 11 by the parties, the suit was set down for hearing and the plaintiff testified on 30th March 2023, adopting his witness statement dated 24th February 2020 and producing filed documents in support of his claim. The trial court record

shows that owing to the pressure of work, the court adjourned the hearing.

4. The matter then came up in court on 14th September 2023, the defendant's counsel Mr. Ondieki told the court that the matter was coming up for defence hearing. The plaintiff on the other hand, told court that he had two other witnesses to call. The court perused the record, and found that no other witness statements had been filed by the plaintiff. That there was also no list of witnesses filed. As such, the plaintiff was barred from calling any other witnesses and a date was fixed for defence hearing.

5. Before the dated for defence hearing, the appellant filed a Notice of Motion dated 18th September 2023, seeking to reopen his case and be allowed to file and serve supplementary list of witness statements. The application was anchored on the grounds that the additional evidence was material to the just determination of the suit and that his failure to file the witnesses' statements was not deliberate. Further, that the witnesses were in court, but their statements were ready but unreceived by the

registry. No response opposing the application was filed by the respondent.

6. In its ruling, the trial court observed that the plaintiff filed his suit on 24th February 2020 together with his witness statement, and after various pre-trial processes, hearing was set for 8th September 2022 but later rescheduled to 30th March 2023 owing to incomplete compliance with Order 11 of the Civil Procedure Rules. That on that date, the Appellant testified and closed his case without indicating intention to call any additional witnesses. That thereafter defence hearing was set for 29th February 2024, but when the matter was called out, counsel for the respondent was unavailable due to engagement in the LSK elections, and the matter was set for mention on 2nd May 2024.

7. In dismissing the motion, the learned trial Magistrate stated that the application was an afterthought, having been filed only on 20th September 2023 long after the plaintiff had closed his case. That the plaintiff did not annex the alleged additional witness statements to the application, thus depriving the court any basis to ascertain

whether the omission was indeed inadvertent. The trial court further held that reopening the plaintiff's case at that stage would prejudice the respondent, who had already prepared her defence, and would result in unnecessary delay in a suit that had been pending for more than four years. The court concluded that no sufficient cause had been demonstrated to justify reopening the case and consequently dismissed the application with costs, directing that the matter proceeds to defence hearing.

8. Being aggrieved by the Judgment of the trial court, the appellant herein filed an amended memorandum of appeal dated 24th June, 2024 in this court, citing four grounds of appeal as follows: -

a. THAT the magistrate erred in law and justice in dismissing an application which was not opposed.

b. THAT the learned magistrate erred in law to formulate grounds of opposition which were not presented to the court hence offending the rule of impartiality which govern the due process of justice.

c. THAT the learned magistrate erred in law and justice by not considering that the application was made with view of enhancing the rule of law as it was meant to bring all material facts before the court to enable it reach a justifiable decision

d. THAT the magistrate having had opposition of application before him did not give the appellant an opportunity to respond to his opposition thereby refusing to offer the appellant an opportunity to be heard.

9. The appellant prayed that the appeal be allowed with costs and that the ruling of subordinate court dated 13th June 2024 be set aside and the plaintiff's case be reopened for hearing.

10. The appeal was canvassed by way of written submissions. On record are appellant's submissions dated 15th July 2024, further submissions by the appellant dated 28th February 2025, and the respondent's submissions dated 2nd April, 2025, all of which this court has duly considered.

Appellant's submissions

11. The appellant submitted that he filed an application before the subordinate court seeking leave to re-open the plaintiff's case in Kakamega CMELC No. E041 of 2020, in order to call witnesses whose evidence he contends is crucial to the fair determination of the dispute involving land parcel BUTSOTSO/SHIKOTI/20190. He asserted that his witness statements had been duly filed and served as early as 18th May 2020 and therefore the trial court erred in finding that none were on record.

12. He argued that the respondent was at all times aware of the witnesses and had even responded to the plaintiff's pleadings, including allegations challenging the validity of the sale agreements. He stated that the respondent failed to substantiate allegations of forgery, despite being granted time to obtain a forensic report from the DCIO. It was his submission that his witnesses, having participated in the execution of the impugned agreements, possess material evidence on the contested allegations of forgery. He also contended that the trial court was wrong in denying him the right to call his witnesses who had been present in court.

13. It was further submitted that at the time the appellant sought to reopen the case, the respondent had not testified and therefore no prejudice would have been occasioned to her if leave had been granted. The appellant maintained that his application was timely, necessary, and brought in good faith, with the sole aim of ensuring that all the relevant evidence is placed before the court for a just determination of the matter.

14. The appellant also submitted that his application in the lower court was not opposed by the respondent, hence the learned magistrate erred in dismissing an unopposed application and further erred by formulating grounds of opposition not raised by the respondent, thereby offending the principles of impartiality and fair adjudication.

15. The appellant relied on Article 50 of the Constitution, emphasizing the constitutional right to be heard and the court's duty to ensure parties are afforded full opportunity to present their cases. He further invoked Sections 1A and 1B of the Civil Procedure Act which enjoin courts to promote substantive justice and efficient disposal of cases. He argued that the lower court's ruling frustrated these

objectives by prematurely closing the plaintiff's case and denying him a fair hearing.

16. In conclusion, the appellant urged this court to find that the learned magistrate misdirected himself in both law and fact by denying the appellant the right to call witnesses. He prayed that the ruling delivered on 13th June 2024 be set aside and the plaintiff's case be reopened for hearing on the merits.

Respondent's submissions.

17. Counsel for the respondent submitted that contrary to the appellant's assertions, the appellant did not file or serve any witness statements together with his amended plaint dated 2nd December 2020, as required under Order 3 Rule 2 and Order 11 of the Civil Procedure Rules. It was argued that the matter progressed to hearing after several pre-trial mentions where both parties confirmed compliance, and the appellant testified on 30th March 2023 without indicating the existence of additional witnesses.

18. It was further contended for the respondent that on 14th September 2023, the appellant for the first time alleged

that he had additional witnesses; however, the court record reflected no prior filing or service of a list of witnesses or statements. The respondent submitted that the trial court correctly held that the appellant could not be permitted to ambush the defence with new witnesses at that stage and proceeded to close the plaintiff's case. That when the matter came up for defence hearing on 29th February 2024, the appellant introduced the application dated 18th September 2023 seeking to re-open his case and file witness statements out of time. Counsel argued that the said application was procedurally defective and unsupported by evidence, noting that no draft witness statements were annexed to demonstrate the materiality of the intended witnesses or justify the court's exercise of discretion.

19. The respondent further submitted that although the application was not opposed initially, the trial court could not grant it automatically, particularly where the appellant failed to prosecute it by filing written submissions as directed. Counsel argued that the court meticulously evaluated the record *suo moto* and gave valid reasons for

dismissing the application, including lack of merit and failure to establish sufficient cause.

20. It was submitted that the appellant should not be allowed to re-engineer his case after realizing weaknesses in his testimony, as litigation must be conducted in accordance with established procedure to prevent trial by ambush. The respondent's counsel submitted that the appellant's conduct unnecessarily delayed the matter and sought to introduce evidence only after testing the defence position, which the court was right to reject. Counsel argued that the appeal is wholly unmerited, frivolous, and intended to delay the conclusion of the substantive dispute and prayed that it be dismissed with costs.

Analysis and determination

21. The court has carefully considered the appeal, parties' written submissions and the entire record.

22. This is an interlocutory appeal challenging the exercise of discretion by the trial court in refusing to allow the appellant to reopen his case before the trial court and present more witnesses. This being a first appeal, the duty

of this court is to re-analyze the findings made by the trial court in view of the issues raised in the matter and decide whether or not to agree with the conclusions made by the trial court, and give reasons either way.

23. Having considered the grounds of appeal raised in the Memorandum of Appeal, the parties' rival submissions and the entire record, the only issue that arise for the court's determination is whether there is sufficient material before court to justify this court's interference with the exercise of discretion by the trial court in dismissing the appellant's application dated 23rd September 2023.

24. This court will not ordinarily interfere with the exercise of discretion by the trial court, merely on the basis that it would have arrived at a different decision if it had heard the matter. This court will only interfere with the exercise of discretion by the trial court where it is shown that the trial court made an error of law or principle; took into account irrelevant considerations; failed to take into account relevant considerations; or the decision is plainly wrong.

25. In the case of **Mbogo & Another vs. Shah [1968] EA.**

93 at page 96, the Court of Appeal maintained that: -

“...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice....”

26. Similarly, the Supreme Court of Kenya in the case of **Apungu Arthur Kibira v Independent Electoral and Commission Boundaries & 3 Others [2019] eKLR** stated:

“We reiterate that in an appeal from a decision based on an exercise of discretionary power, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court case of Kacem v Bashir [2010] NZSC 112; [2011]2 NLRI (Kacem) where it was held para 32:“In this context a general appeal is to be distinguished from an appeal against the decision made in

exercise of discretion. In that kind of case, the criteria for a successful appeal are stricter: (i) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.”

27. In the instant matter, the trial court held that the impression the appellant gave was that he inadvertently failed to file witness statements and that he ought to have attached the witness statements. That when the appellant closed his case he never told court that he had other witnesses.

28. This court has perused the proceedings. The appellant's testimony was taken on 30th March 2023. At the close of cross examination, the trial court indicated that due to pressure of work, the hearing was adjourned to 14th September 2023. Come that day, the respondent's counsel informed court that the matter was for defence hearing and he was ready to proceed. The court slated the matter for defence hearing at 11:30 am. On that day, the plaintiff informed court that he had two witnesses which he intended to call. The court noted that as there are no other

witness statements, the appellant was not allowed to call witnesses. That was when the respondent's counsel sought that the appellant's case be closed and subsequently the court ordered that the plaintiff's case is closed. On that date, the matter was adjourned and defence hearing slated for 29th February 2024. The appellant is a *pro se* litigant while the respondent had legal representation.

29. Article 159 of the Constitution enjoins a court to administer substantive justice without delay. The proceedings herein show that the appellant had been coming to court with witnesses, as seen from the proceedings of 15th December 2022. The role of the court is to ensure both procedural and substantive justice is done. Where the court deals with a *pro se* litigant, it ought to ensure that such litigant, just like the represented litigant is accorded fairness in the court's processes. In this case, the appellant did not close its case after his testimony and the trial court did not invite him to inform court whether he intended to close his case at that point. Instead, the trial court closed the appellant's case on application of the respondent's counsel without a response

from the appellant on that matter. The application dated 18/9/2023 was not opposed and for the court to hold that the respondent would be prejudiced, when the respondent did not say so, was a consideration of a matter that was not in dispute, and therefore an irrelevant matter. The court ought to have taken into account the fact that the respondent had not testified in defence.

30. In the premises, I find and hold that the trial court failed to take into account the fact that the appellant was a pro se litigant who needed to be availed opportunity to have a say in the court's processes, and took into account the prejudice to be suffered by the respondent when none had been demonstrated. Thus, the trial court took into account irrelevant matters and failed to take into account relevant matters in arriving at its conclusion. For the above reasons, this appeal succeeds and is allowed. The ruling of the trial court made on 13th June 2024 is hereby set aside and substituted with an order that the application dated 18th September 2023 is allowed. Therefore, the appellant's case before the trial court is reopened, the appellant shall

file and serve witness statements and supplementary list of documents in 21 days of this judgment.

31. As the appellant's application has occasioned delay in the prosecution of the lower court matter, I order that each party shall bear its own costs of the appeal and the costs in the lower court in respect of the application dated 18/9/2023.

32. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA IN
OPEN COURT/VIRTUALLY THROUGH MICROSOFT
TEAMS VIDEO CONFERENCING PLATFORM THIS 26TH
DAY OF NOVEMBER, 2025**

**A. NYUKURI
JUDGE**

In the presence of;

The appellant in person

Mr. Ondieki for the respondent

Court Assistant: Delphine

