Diffu v Were (Environment and Land Appeal 6 of 2020)
[2025] KEELC 5324 (KLR) (15 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5324 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIRONMENT AND LAND APPEAL 6 OF 2020

BN OLAO, J

JULY 15, 2025

BETWEEN

ANTHONY MASIBO DIFFU ..... APPELLANT

AND

MILDRED AWINO WERE ..... RESPONDENT

(Being an appeal from the ruling of Hon Patrick A. Olengo Senior Principal Magistrate delivered on 25th June 2020 in Busia Chief Magistrates Court Miscellaneous Civil application No 3 of 2020)

JUDGMENT

1. Mildred Awino Were (the Respondent herein) filed a Notice of Motion dated 15th May 2020 in the Chief Magistrate's Court Busia being miscellaneous application No 3 of 2020 in which she sought the following orders against Antony Masibo Diffu (the Appellant herein):
    1. Spent
    2. That the restriction placed on L.R No Bukhayo/Bugengi/14739 and 14740 be removed.
    3. That the Land Registrar Busia County do comply.
    4. That costs of this application be in the cause.
2. The Motion was supported by the Respondent's affidavit and based on the grounds set out therein.
3. The gist of the Motion was that the Respondent is the registered proprietor of the land parcels No Bukhayo/Bugengi/14739 and 14740 (the suit properties) yet the Appellant, without any proper reason, had placed a restriction thereon. That while the Respondent has the title deeds for the suit property which he had obtained after due process, the Appellant had not filed any suit to challenge

the validity of the said titles yet he had placed restrictions thereon. Copies of certificates of search were annexed.

4. In opposition to the Motion, the Appellant filed a Notice of Preliminary Objection dated 12th June 2020 in which he raised the following grounds:

    1. That there is no suit properly before Court for determination.

    2. That the suit has been commenced through unprocedural means and is thus fatally defective.

    3. That further, this Honourable Court has no jurisdiction.

    The record shows that on 19th May 2020, counsel for the Appellant sought an adjournment to enable him file a replying affidavit. He was given upto 16th June 2020 to do so.

5. However, on 16th June 2020, Mr Okutta counsel for the Respondent informed the trial magistrate that Ms Maloba counsel for the Appellant had not filed any replying affidavit to the Motion nor attend the Court. He also told the Court that the caution had been placed on the land parcel No Bukhayo/Bugengi/801 which no longer existed adding that the Court had the mandate under Section 78(2) of the *Land Registration Act* to remove any restriction on land. Mr Okutta asked the Court to allow the Motion as it was not opposed. The trial Court set a ruling date for the Motion for 23rd June 2020.

6. When the matter came up on 23rd June 2020 however, no ruling was delivered. Instead, Mr Wambura holding brief for the Appellant's new counsel Mr Oluoch Olunga was present and he informed the trial Court that the Appellant's counsel had no objection to Mr Okutta making oral submissions in response to the Appellant's written submissions dated 19th June 2020 and which had been filed on 22nd June 2020 in support of the Appellant's Preliminary Objection dated 12th June 2020. The Court obliged and Mr Okutta made oral submissions in which he urged the trial Court to ignore the Appellant's submission adding that the Appellant had placed a restriction and not a caution on the suit properties. He made reference to the fact that the Appellant who had placed the restriction on the suit properties had no right over them. And with regard to the submission by the Appellant that the trial magistrate had no jurisdiction as the suit properties measure 31 acres and one acre is valued at Kshs.1million, Mr Okutta orally submitted that no evidence had been adduced in the form of a replying affidavit or a valuation report to that effect.

7. On his part, the Appellant, vide his submissions dated 12th June 2020, raised the following issues:

    1. That the trial Court had no jurisdiction as the suit property measures 31 acres whose value translates to thirty-one million at a value of one million per acre. This is well beyond the pecuniary jurisdiction of twenty million capped for the trial Court under the Magistrate's Court Act.

    2. There was no proper suit before the trial magistrate as the Respondent did not follow the procedure outlined under Section 73 of the *Land Registration Act* for the removal of a caution or Section 78 of the same Act for the removal of a restriction. That there is a provision by which a suit can be commenced and that cannot be by way of a Motion. It can only be by way of a Plaint, a Petition or an Originating Summons. The Appellant cited in his submissions the provisions of Order 3 Rule 1 of the Civil Procedure Rules and also the cases of Kiptuya Ngerech Too -v- Peris Wangui Macharia & another 2018 eKLR as well as the case of Joseph Kibowen Chemjor -v- William Kisera 2013 eKLR. He therefore urged the Court to allow the Preliminary Objection.

8. Having heard the Respondent's oral submissions on the Motion as urged by Mr Okutta as well as the Appellant's written submission in support of his Preliminary Objection as filed by the firm of Oluoch-olunya & Associates advocates, the trial magistrate delivered a ruling on 25th June 2020 allowing the Respondent's Motion dated 15th May 2020 with costs.

9. The ruling provoked this appeal in which the Appellant raised the following six (6) grounds in seeking to set aside the said ruling and instead, allow the Appellant's Preliminary Objection:

    1. That the learned trial magistrate erred in law and in fact in arriving at a decision contrary to the law and facts before the Court.

    2. That the learned trial magistrate erred in law and in fact in dismissing the Appellant's Notice of Preliminary Objection.

    3. That the learned trial magistrate erred in law and in fact in failing to consider that the Respondent's application had been commenced through unprocedural means and thus was fatally defective.

    4. That the learned trial magistrate erred in law and in fact in failing to consider that there was no suit properly before the Court for determination.

    5. That the learned trial magistrate erred in law and in fact in failing to consider the Appellant's submissions and authorities laid before him.

    6. That the learned trial magistrate's ruling was contrary to the weight of evidence and law thereby rendering the same proper to be set aside.

    Arising out of the above, the Appellant sought the following remedies:

    1. That the trial magistrate's ruling and order dated 25th June 2020 be set aside.

    2. That the Appellant's Notice of Preliminary Objection be allowed.

    3. That the Respondent be ordered to pay the Appellant's costs of this appeal.

10. The appeal has been canvassed by way of written submissions. These have been filed by Mr Ondari instructed by the firm of Ogetto, Otachi & Company Advocates for the Appellant and by Mr Okutta instructed by the firm of Ouma-okutta & Associates Advocates for the Respondent.

11. I have considered the record of appeal and the submissions by counsel.

12. This being a first appeal, this Court is aware that it's duty is to re-consider and re-evaluate the evidence on record and thereafter draw its own conclusions. In so doing I must remember to be guided by the principles set out by the Superior Courts in cases such as Selle & Another -v- Associated Motor Boat Company Ltd 1968 E.A 123 and also Mwanasokoni -v- Kenya Bus Services Ltd 1985 KLR 931 [1985 eKLR] among others. In the case of Peters -v- Sunday Post Ltd 1958 EA 414, it was held that:

> "Whilst an appellate Court has jurisdiction to review the evidence to determine whether conclusion of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate Court will not hesitate so to decide."

This appeal also arises out of the exercise of discretion by the trial magistrate in arriving at the decisions which he did. This Court will therefore be guided by the principles set out in the case of Mbogo & Another -v- Shah 1968 EA 93 where the Court said:

> " An appellate Court will not interfere with the exercise of the trial Court's discretion unless it is satisfied that the Court in exercising it's discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous or unless it is manifest from the case as is whole that the Court has been clearly wrong in the exercise of judicial discretion and that as a result there has been mis-justice."

13. I shall commence with ground NO 2 where the trial magistrate is faulted for dismissing the Appellant's Notice of Preliminary Objection dated 12th June 2020 which I have already cited above and which was that there was no suit properly before the Court for determination, that the suit was commenced through unprocedural means and therefore fatally defective and finally, that the trial Court had no jurisdiction to hear the dispute.

14. A Preliminary Objection as is now well settled in the locus classicus case of Mukisa Biscuit Manufacturing Company Ltd -v- West End Distributors Ltd 1969 EA 696, per LAW JA:

> " ...consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration." Emphasis mine.

In the same case, Newbold P had the following to say:

> " A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion." Emphasis mine.

It is clear that the issues about there being no proper suit before the Court or that the suit was commenced through unprocedural means are not issues of pure law. They were therefore not properly raised as Preliminary Objection.

15. On the issue of want of jurisdiction by the trial magistrate, the Appellant in paragraphs 24 to 28 of his submissions dated 19th June 2020 submitted that the value of the suit properties was Kshs.31 million and therefore beyond the pecuniary jurisdiction of the trial Court as set out in Section 7(1) of the Magistrates' Court Act. This is how the Appellant's counsel submitted in paragraphs 24, 26 and 27 of his submissions:

    24: "Your Honour, the Respondent submits that the suit property measures approximately 31 acres. The value of the property is approximately Kenya Shillings one million per acre which translates to Kenya Shillings one million for the 31 acres."

    26: "Your Honour, Section 71(1) of the Magistrates Court Act limits the pecuniary jurisdiction of the Magistrates Court to Kenya shillings twenty million."

    27: "Your Honour, even if the Applicant would have instituted proper pleadings before this Honourable Court, the same would not have proceeded before this Honourable Court since the value of the property is over Kenya Shillings twenty million."

When counsel for the Respondent in this appeal (and who was the applicant in the trial Court) made his oral submissions before the trial magistrate on 23rd June 2020, this is what he said in response to those submissions:

> "On the issue of jurisdiction, they said the land is 33 acres and if each acre were to go for 1 million, the Court do not find issues of fact using way of hypothesis. The value in Bugengi is about 400,000/=, they did not give evidence. They cannot bring issues of evidence via submissions. They should have filed a replying affidavit or can put in valuation report."

On that issue of jurisdiction, the trial magistrate discussed it at page 17 of the impugned judgment (page 57 of the record of appeal) as follows:

> "I will first deal with the issue of jurisdiction. The Respondent submitted that the value of land in Bugengi area is about 1 million and that the property in dispute is about 31 acres thereby give the value of the property in question to about 31 million. Vale of immovable property is determined by an expert. It requires a valuation report to show the value of the property in question. There was no valuation report that was presented to Court that shows the value of the suit property to be one million per acre. There is no evidence in Court to show that the value of land in that area is one million. Bugengi area is found in the vicinity of Busia town which is a rural town and I do not think the property value has reached the level where one acre has reached the high value of 1 million per acre. The value stated by Mr Okutta of about 400,000/= could be reasonable unless we have an expert report stating the contrary."

Although the trial magistrate went on a limb of his own to try and hazard the value of the suit properties, he eventually decided, and rightly so, that a valuation report was the best evidence to confirm the value of the suit properties. The Appellant having asserted that the size of the suit property was 31 acres with a value of Kshs.1 million per acre and therefore the value was Kshs.31 million, the onus was on him under Section 109 of the *Evidence Act* to prove that assertion. That provision reads:

> 109: "The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

The Appellant ought to have availed a valuation report to prove that the value of the suit properties was Kshs.31 million and well beyond the pecuniary jurisdiction of the trial Court. In any event, the Certificate of Search for the land parcel No Bukhayo/Bugengi/14739 shows that it measures 5.6 Hectares (13.8 acres) while the Certificate of Search for the land parcel No Bukhayo/Bugengi/14740 measures 2.6 Hectares (6.4 acres) measurement that the total acreage of the suit properties is 20.2 acres and not 31 acres. In the absence of a valuation report, the Appellant's claim that the value of the land was 1 million an acre could not stand. The trial magistrate was right to make a finding that he was seized of the requisite jurisdiction, in the absence of such a valuation report.

16. Ground No 2 of the memorandum of appeal must be dismissed.

17. Grounds No 3 and 4 can be considered together. Therein, the trial magistrate is faulted for failing to consider that the Respondent's application had been commenced through unprocedural means and that there was no proper suit before him.

18. That issue was canvassed in paragraphs 7 to 23 of the Appellants submissions dated 19th June 2020 and filed in the subordinate Court. For purposes of the grounds NO 3 and 4 of the appeal, I shall cite paragraphs 7, 10, 11, 12, 13, 14 and 15 of those submissions:

7: "Your Honour, the Respondent does not dispute that he placed a caution and a restriction over the suit property. The restriction registered by the Respondent was to protect the Respondent's beneficial interest in the suit land which had been fraudulently transferred to the applicant.

10: "Your Honour, if the applicant was desirous of removing the caution, she could have followed the procedure for the removal or withdrawal of a caution as outlined under Section 73 of the *Land Registration Act*. This Section provides as follows:

1. A caution may be withdrawn by the cautioner or removed by order of the Court, or subject to subsection (2) by order of the Registrar."

11: "Your Honour, similarly Section 76 of the *Land Registration Act* provides for circumstances when a restriction can be placed on the land while Section 78 provides for the removal and variation of restrictions. Section 76(1) provides that:

For the purposes of compulsory acquisition the prevention of any fraud or improper dealing or for any other sufficient cause; the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such person as the Registrar considers fit, make and order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge."

12: "Your Honour, both cautions and restrictions can be removed by the Court upon the application of the proprietor of the land."

13: "Your Honour, it is clear from the applicant's application that there is a dispute on the ownership of the suit property, however, the manners in which the dispute was brought before this Honourable Court was unprocedural."

14: "Your Honour, the motion before the Court is a nullity and cannot stand on it's own since a suit cannot be commenced by way of Notice of Motion but can only be commenced by way of a Plaint, a Petition or an Originating Summons. No Plaint, Petition or Originating Summons was attached to the Notice of Motion dated 15th May 2020 when the same was served upon the Defendant."

15: "Your Honour, by purporting to initiate her suit by way of a Notice of Motion, it means that no summons could competently issue and accordingly the Respondent could not enter appearance which is the only way to answer to a summons and to file a response or defence thereto in defence of the allegations leveled against the Respondent."

In response to those submissions, counsel for the Respondent made the following oral submissions before the trial Court on 23rd June 2020:

> "Section 78(2) states how restrictions should be removed. It states that it can be by an application and notice to the other party. The Court after hearing both parties can remove a restriction. We came through a notice of motion we annexed evidence over how the restriction was placed and who placed the restriction. The person who put restriction did not have a right over that. They should have moved to Court to place an inhibition. He has not put any replying affidavit. The restriction was placed on land 801 and once the land was subdivided it is not transferrable. The issue of caution is 6 months. Section 73 of LRA."

In the impugned ruling, the trial magistrate addressed the issue at page 23 (page 63 of the record of appeal), as follows; after citing several cases:

> " In my view, the procedure of removal or variation of a restriction is clearly provided for. It is by way of an application with notice to the Registrar. The only way to bring an application under the provisions of the *Civil Procedure Act* and the Civil Procedure Rules is by way of notice of motion which the applicant has done.
>
> Order 37 of the Civil Procedure Rules does not provide specifically the manner in which an application under the provisions of Section 78(2) of the LRA can be brought before Court. Even if it did, I think the provision of Section 78(2) of the LRA will prevail being a parent act (sic) and the substantive law which prevails when compared to subsidiary legislation"

The Appellant's submission that the Respondent moved to the subordinate Court "by purporting to initiate her suit by way of a Notice of Motion" cannot be correct. The Respondent did not file any suit and she had no reason to do so because what she wanted the Court to determine was not the ownership of the suit properties. What she wanted the Court to do was to lift the restriction which the Appellant had placed on the suit properties. While the filing of a suit would also have served the same purpose, it was sufficient for the Respondent to file the Motion as she did. She cited the provisions of Sections 3, 3A and 63(e) of the *Civil Procedure Act* as well as Article 159 (2) of *the Constitution*. It is trite law that citing the wrong provisions of the law is not fatal to a case. Article 159 (2) (d) of *the Constitution* is clear that:

d: "Justice shall be administered without undue regard to procedural technicalities..."

While Section 3A of the *Civil Procedure Act* which provides for the inherent jurisdiction of the Court provides that:

3A: "Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

The record shows that the Appellant placed a restriction on the suit properties on 28th November 2019. The procedure for the removal of a restriction is set out in Section 78(1) and (2) of the *Land Registration Act* which reads:

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(1): "The Registrar may, at anytime and on application by any person interested or at the Registrar's own motion, and after giving the parties affected by the restriction an opportunity of being heard, order that the removal or variation of a restriction."

(2): "Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the Court may order a restriction to be removed, varied, or other order as it deems fit, and may make an order as to costs."

It is clear from Section 78(2) of the *Land Registration Act* that the Court has the power to remove a restriction placed on land. The certificates of search shows that the restriction placed on the suit properties on 28th November 2019 read:

> " Restriction: No dealings as caution on title NO 801 was not lifted and still valid. Anthony Masibo Diff Tel: 0718096865."

The Respondent's case was that the Appellant had paced a restriction on the suit properties without any reason. She averred in paragraphs 3, 4 and 5 of her supporting affidavit that:

3: "That I am the registered owner of L.R No Bukhayo/Bugengi/14739 and 14740. I annex copies of the official search forms as M.A.W (a) and (b)".

4: "That the Respondent herein has placed restriction on my parcels of land without any proper reason."

5: "That I do not know the Respondent neither have we ever entered into any transaction with him."

Under Section 76 (1) of the *Land Registration Act*, restrictions are placed on land for purposes of preventing fraud or improper dealings or for any other sufficient cause including for compulsory acquisition of the land. The Appellant did not file any replying affidavit in response to the Motion to rebut the Respondent's averments as contained in her supporting affidavit. The Appellant was content in only filing a Preliminary Objection questioning the trial magistrate's jurisdiction to determine the Motion and which Objection, and rightly so, was dismissed by the trial magistrate as Section 78(2) of the *Land Registration Act* clearly empowers the Court to remove a restriction.

19. It must also be remembered that a restriction on land is not intended to remain indefinitely. Indeed, under Section 76(2) of the *Land Registration Act*, it is provided that:

(2): "A restriction may be expressed to endure –

(a) for a particular period;

(b) until the occurrence of a particular event; or

(c) until a further order is made and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register."

The restriction placed on the suit properties suggest that the said land was created notwithstanding that there was an existing caution on the mother title being LR. No Bukhayo/Bugengi/801. If that be the case, then it was important for the Appellant to avail evidence of that caution. In any event, at paragraph 5 of his submissions, counsel for the Appellant has stated thus:

5: "Upon issuance of the Court order, the Respondent herein and their agent entered the suit properties, demolished the Appellant's developments and forcibly evicted the Appellant from the property. The properties were transferred to Mathews Tonado Okech."

The Appellant did not avail any evidence to show that the proprietorship of the suit properties had since changed and neither did the Respondent's counsel deny that submission. In that case, it means that following the delivery of the impugned ruling, another person now owns the suit properties and this renders the appeal moot and an academic exercise.

20. It is clear to this Court that grounds No 3 and 4 are for dismissal.

21. Finally, in grounds No 1, 5 and 6 of the memorandum of appeal which can be considered together, the Appellant's case is that the trial magistrate erred in law and in fact by arriving at a decision contrary to the law, in failing to consider the Appellant's submissions and authorities and by delivering a ruling which was contrary to the weight of the evidence and the law.

22. From the record, the Appellant's counsel in his submissions before the trial Court made reference to the following cases; Kiptuya Ngerech Too -v- Peris Wangui Macharia & Another 2018 Eklr, Joseph

Kibowen Chemjor -v- William C Kisera 2013 Eklr And Owners 'lillian S' -v- Caltex Oil (Kenya) LTD 1989 eKLR. I have perused the impugned ruling and find that the trial magistrate referred to all the above authorities at pages 11, 13, 15, 16, 18 and 22. The trial magistrate also made reference to other cases which counsel had not cited. For instance, at page 18 of the impugned ruling, the trial magistrate referred to the case of Kiptuya Ngerech Too -v- Peris Wangui Macharia (supra) where the judge took the view that a caution can only be removed by way of a plaint. A similar view was taken by another Judge in the case of Joseph Kibowen Chemjor -v- William C Kisera (supra). The trial magistrate then contrasted those cases with the decision of another Judge in the case of Abdi Abdillahi Somo -v- Ben Chikamai & 2 others 2016 eKLR where that Judge had this to say:

> " In my life as a Judge, I have in the past heard arguments being advanced that a notice of motion cannot commence substantive proceedings. But it should be understood that, as a matter of general principle, a notice of motion is a competent way of initiating substantive proceedings in Court. It will depend on the particular statute governing the particular proceedings in question. Therefore, where the law provides for the manner of commencing a suit or proceedings in Court, then that procedure applies."

Having considered those authorities all by Judges, the trial magistrate had this to say at page 22 of the impugned ruling:

> " From the foregoing authorities, there is no clear-cut position on whether a notice of motion can be used to commence or institute an action for removal of a caution. There are two conflicting positions. I think I will take the position that a notice of motion can be used to institute an action for removal of a caution so long as the other party is not prejudiced. This I do so because even Article 159(2) (d) of *the Constitution* which is the Supreme law on land.
>
> Even if I am wrong on what I have stated above, I think the case of Kiptuya Ngerech Too (supra) and the case of Jospeh Kibowen Chemjor (supra) are distinguishable from the case in question.
>
> Both dealt with the removal of a caution which is not the case herein. We are dealing with a removal of a restriction. The procedure for removing a restriction is different from the procedure of removing a caution as stipulated under the provisions of the *Land Registration Act*."

The trial magistrate was faced with conflicting decisions of the Superior Court. For purposes of good order and the proper administration of justice as well as the common law doctrine of stare decisis, the trial magistrate was bound by those decisions. However, nothing stopped the trial magistrate from distinguishing those cases from the circumstances in this case which he did and finally opted to follow the route set out in the case of Abdi Abdillahi Somo -v- Ben Chikamai & 2 others (supra). It is not correct, therefore, for the Appellant to claim that the trial magistrate did not consider the Appellant's submissions and authorities. The trial magistrate also properly applied his mind to the provisions of Section 78(2) of the *Land Registration Act* which was the law applicable.

23. It is also instructive to note that whereas in his submissions the Appellant laid claim to the suit properties on the basis of being an Administrator to the Estate of Charles Diffu, no such evidence was placed before the trial magistrate to enable him exercise his discretion in favour of sustaining the restriction which had been in place since 2017 that is for some 3 years before the Motion in the

subordinate Court was filed on 15th May 202. As was held by the Court of Appeal in the case of Boyes -v- Gathure 1969 EA 385, a caveat is intended to serve two purposes:

> " On the one hand, it is intended to give the caveator temporary protection, and on the other, it is intended to give notice of the nature of the claim to the person whose estate in the land is affected and to the world at large." Emphasis mine.

A restriction cannot therefore lie without a time limit and the one which the Appellant has lodged on the suit properties herein was clearly such a caveat.

24. If the Appellant has any interest, legal or equitable, in the suit properties, nothing stops him from instituting a suit of his own seeking any redress, subject of course to any limitations.

25. Up-shot of all the above is that having considered this appeal, I issue the following disposal orders:

    1. The appeal is dismissed.

    2. The Appellant shall meet the costs of the Respondent both here and in the Court below.

BOAZ N. OLAO

JUDGE

15TH JULY 2025

JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 15TH DAY OF JULY 2025.

Right of Appeal.

BOAZ N. OLAO

JUDGE

15TH JULY 2025