



Khamisi & 2 others (The administrators of the Estate of Hamisi Juma Male aka Hamisi Juma Malee) v Ger & another (Environment and Land Appeal E016 of 2023) [2024] KEELC 351 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEELC 351 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E016 OF 2023
SM KIBUNJA, J
JANUARY 31, 2024**

BETWEEN

**MWANAJUMA KHAMISI 1ST APPELLANT
SALAMA SHOMONI HAMISI JUMA 2ND APPELLANT
IBRAHIM KHAMIS JUMA 3RD APPELLANT
THE ADMINISTRATORS OF THE ESTATE OF HAMISI JUMA MALE AKA
HAMISI JUMA MALEE**

AND

**MIKE GER 1ST RESPONDENT
DARUL NAEEM APARTMENTS LIMITED 2ND RESPONDENT**

JUDGMENT

1. The appellants being dissatisfied with the ruling of Hon. M. Nabibya, PM, delivered on 26th July 2023 in Mombasa CM Land Misc. App. No. E128 of 2022 preferred this appeal through the memorandum of appeal dated the 9th August 2023 raising the following ten (10) grounds:
 1. “That the trial magistrate erred in law and fact by dismissing the un-defended application dated 30th March 2022.
 2. That the trial magistrate erred in law and fact by failing to appreciate the provisions brought by the [Land Laws \(Amendment\) Act](#) 2016.
 3. That the trial magistrate erred in law and in fact in failing to find that since the Respondent did not apply for relief for the notice as envisaged under section 152 F of the [Land Act](#) the



Appellant's title to the suit property remain unchallenged at the time of the filing of the of the Appellant application dated 30th March 2022.

4. That the trial magistrate erred in law and in fact by delving into issues of lack of pleadings or proper pleadings whereas there was no declaration or action sought in the application.
 5. That the trial magistrate erred in law and fact by refusing to be bound by judgment of the superior courts and refusing to provide reasons for departing from decided cases.
 6. That the trial magistrate erred in law and fact by failing to find that the decision in *Misigab v Sudi & 4 others* (Environment and Land Miscellaneous Application 28 of 2022) [2022] KEELC 14825 (KLR) (15 November 2022) (Ruling) was distinguishable as the application in the decision was opposed.
 7. That the trial magistrate erred in law and fact by failing to grant the prayers as sought in the application dated 30th March 2022 and directing that the Appellant file a suit a procedure not envisaged with the concept of the *Land Act* as brought through the Land Laws (Amendment) Act 2016.
 8. That the trial magistrate erred in law and fact by failing to appreciate that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.
 9. That the trial magistrate erred in law and fact by dismissing the un- defended application dated 30th March 2022 with costs to a party who never appeared.
 10. That the trial magistrate erred in law and in fact by in failing to appreciate the appellant submissions.”
2. The appeal was canvassed through submissions filed by the learned counsel for the appellant dated the 28th August 2023, which the court has considered.
 3. The following are in the view of this court the salient issues for determination:
 - a. Whether the appellant's application as filed was properly before the trial court.
 - b. Whether the learned trial magistrate erred in law and fact in dismissing the appellant's application with costs while it was undefended.
 - c. What orders to make in this appeal.
 4. The court has carefully considered the grounds on the memorandum of appeal, submissions by the learned counsel for the appellant, superior courts decisions cited thereon, the record of appeal and come to the following conclusions:
 - a. In the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that;

“ An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”



The learned counsel for the appellant cited the Court of Appeal decision in the case of *Abok James Odera t/a A. J. Odera & Associates versus John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, where it was held that:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”

Similarly, in the case of *Peters v Sunday Post Ltd* [1958] EA 424, the Court held that;

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions 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 being a first appeal from the trial court, and in view of the foregoing decisions, I am obligated to reconsider the evidence tendered before the trial court, evaluate it and draw my own conclusions, while reminding myself that I have neither seen nor heard the witnesses and therefore make due allowances in that respect.

- b. From the record of appeal dated 28th August 2023, it is apparent that the appellant had moved the trial court through the notice of motion under certificate of urgency dated 30th March 2022 that was filed through a miscellaneous application. The orders sought were for inter alia that the court allow service through advertisement; eviction order of the respondents from Plot No. 27/1/MN, CR. 18089 and for OCS Nyali police station to provide security. The application is based on the fourteen (14) grounds on its face marked (a) to (n) and supported by the affidavit of Salama Shomoni Hamisi Juma, sworn on the 30th March 2022. The copy of the proceeding in the record of appeal shows at page 34 that on the 28th April 2023, the court had granted the Appellants’ advocate oral application to serve the respondents through advertisement. Then on the 8th June 2023 the counsel informed the court that they had served the respondents by way of advertisement and sought for time to file submissions. At page 27 of the record of appeal is an affidavit of service by counsel for the appellants sworn on the 19th May 2023 annexing a copy of a page from the Standard Newspaper of Monday the 15th May 2023 carrying the said advertisement.
- c. The respondents did not file an appearance or reply to the application though served through the advertisement. The learned counsel for the appellants filed written submissions before the trial court dated the 9th June 2023.
- d. In her ruling delivered on the 26th July 2023, the learned trial magistrate among others held as follows;

“I have considered the undefended Miscellaneous Notice of Motion carefully. I have also perused and read the case of Fredrick Mwangi Nyoga versus Garam Investments & another, NRB HCCC NO. 249/19. And Nairobi HCCC No. 64 of 2006 Vijay Kumar D. K. versus Suresh Mohanlal Fatana & 8 others where the courts stated



that Miscellaneous Notice of Motion & Chamber Summons Application are not pleadings for purposes of instituting a suit under section 2 of the *Civil Procedure Act*.

It therefore shows that applicants herein has no proper pleadings to enable court determine the issues raised. Exhaustively. Applicant should consider filing a proper suit for the desired reliefs. This was also the decision of Justice Kibunja in ELC Miscellaneous Application No. 28 of 2022.

The application is therefore dismissed with costs.”

The trial court dismissed the application dated 30th March 2022 for there being no proper pleadings before the court. The learned trial magistrate cited several decisions from the superior courts, including a ruling delivered by this court Miscellaneous Application 28 of 2022, Mary Obora Misigah & Another versus Hamisi Sudi & others. That unlike in this case, that application was defended. The court held as follows:

“That whereas the applicant claims to be the registered and or the beneficial owner of the suit land has not been challenged by the respondents, her application to have the respondents vacate or evicted has been vehemently opposed on the basis that they have been on the said land for more than 12 years, and therefore have attained ownership by prescription of the law. That is a serious challenge to the applicant’s title to the suit land, and this application brought through a miscellaneous application cannot be a proper forum to deal with the dispute.

- b. That as was submitted by the respondents, contentious civil disputes should be commenced through a suit by either filing a plaint, petition, or originating summons as provided for in the Civil Procedure Rules. The Rules also provide for commencing of judicial review writs through notice of motion, and leave applications through chamber summons. The instant proceeding was commenced through notice of motion which is not an originating summons as was held in Makueni Elc Misc, Appl. E12 of 2021, Norah Ndunge Henry & Another versus Abedinego Mutisya & Another. In Nairobi HCCC No. 249 of 2019, Fredrick Mwangi Nyaga versus Garam Investments & Another and Nairobi HCCC No. 64 of 2006, Vijay Kumar Davalji Kanji Gohil versus Suresh Mohanlal Fatana & 8 Others, where the courts stated that miscellaneous notice of motion and chamber summon applications are not pleadings for purposes of instituting a suit under section 2 of the *Civil Procedure Act* chapter 21 of the Laws of Kenya.c.The foregoing clearly shows that the applicant has no proper pleadings before the court upon which the issues raised by both sides can be exhaustively deliberated and decided on. That as the applicant and respondents now have notice of the nature of each other’s probable claim over the suit land, they should consider filing a proper suit against the other for the desired reliefs or orders. d. That though the court



finds the application to be without merit, I find this to be a proper instance where each party should bear their own costs the provision of section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya notwithstanding.”

- e. Analysing the affidavit evidence, and the submissions before the trial court, it was important to establish whether the application dated 30th March 2022 had raised any cause of action. On evictions from private land section 152E of Land Act No. 6 of 2012 provides that:

“ 152E

- (1) If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.
- (2) The notice under subsection (1) shall -
 - a. be in writing and in a national and official language;
 - b. in the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;
 - c. specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and
 - d. be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.”

Section 152F of the said Act provides for reliefs available upon receipt of such notice.

- f. The respondents herein did not respond to the advertisement of the application carried out through the Standard Newspaper of 15th May 2023, and the court has no way of establishing whether they had ever been served with a notice envisaged under section 152E (1) of the Land Act. That provision is silent on the procedure that follows, after service of the said notice, where those expected to be evicted do not take action as provided in section 152F of the said Act. Where notices have been issued in accordance with section 152E of the Land Act and no action or steps are taken as anticipated under section 152F of the said Act, there would be no necessity of filing suit before proceeding with the eviction so long as it is done in accordance with the law.
- g. The appellants relied on the case of Margaret Karwira Mwangera versus Francis Kofi (2019) eKLR where the court allowed an application which was based on section 152E of the Land



Act. That decision is of persuasive value and I appreciate the rationale of learned judge in the said case. However, I am of the view that where the claim on cause of action raises contentious issues the correct procedure would be to file a suit through for example, a plaint or originating summons with or without an application, against the party or parties concerned. A “cause of action” is defined in Halsbury’s Laws of England, 4th Edition, as meaning simply a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person. The phrase has been held from earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which a defendant would have a right to traverse. “Cause of action” has also been taken to mean that particular act on the part of the defendant which gives the plaintiff his cause of complaint, or the subject-matter of grievance founding the action, not merely the technical cause of action.

- h. From what the court can gather from the facts set out in the application filed before the trial court, the appellants relies on certain facts which need to be proved, so as to succeed in the claim, such as the averments in paragraph 7 of the supporting affidavit sworn on 30th March 2023 which states:

“7. That the deceased Hamisi Juma Male aka Hamisi Juma Malee had offered tenancy on the subject matter land to the family of the respondent on terms of house without the land.”

To prove such facts, the rules of evidence would require an application founded on a proper suit.

- i. That as the application before the trial court was undefended, there was no basis for the learned trial magistrate to make an order on costs when dismissing the notice of motion. In any case section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya prescribes that costs shall follow the event unless for good cause otherwise ordered. I find no good cause that would justify the costs being awarded in undefended application that has been dismissed in this matter. Other than on the issue of costs, I find no fault in the conclusions of the learned trial magistrate on the other issues of determination.

5. That having come to the foregoing conclusions, the court finds and orders as follows:

- a. That the appeal succeeds limited to the order on costs, which is hereby set aside.
- b. That other than on the order of costs, the appeal is hereby dismissed.
- c. That as the application before the lower court and this appeal have been undefended, no costs are awarded.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED ON THIS 31ST DAY OF JANUARY 2024.

S. M. Kibunja, J.

ELC MOMBASA.

In the Presence of:

Appellants : Mr. Mwangunya.

Respondents: No appearance.

Wilson – Court Assistant.



S. M. Kibunja, J.
ELC MOMBASA.

