



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kamangu & another v Karioki (Civil Appeal E34 of 2021)  
[2024] KEELC 402 (KLR) (23 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 402 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
CIVIL APPEAL E34 OF 2021  
JM ONYANGO, J  
JANUARY 23, 2024**

**BETWEEN**

**JOHN KAMANGU ..... 1<sup>ST</sup> APPELLANT**

**JACKSON MWANGI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ELIZABETH WAIRIMU KARIOKI ..... RESPONDENT**

**JUDGMENT**

1. This appeal traces its antecedent from a suit filed by the Respondent against the Appellants in the lower court in which she alleged that the Defendants had encroached on her land. She thus sought the following reliefs:
  - a. A declaration that the plaintiff is the absolute owner of the whole of land parcel known as Kapsaret/kapsaret Block 1 (yamumbi)/320 measuring approximately 1.619 Ha and the Defendants' action amount to an interference with the proprietary interests of the Plaintiff over the suit land.
  - b. An order of permanent injunction to restrain the defendants whether by themselves, their agents/servants and/or employees from trespassing into, wasting, erecting a fence, leasing, interfering, charging, selling, sub-letting, interfering with and any manner way whatsoever dealing with the parcel of land known as Kapsaret/kapsaret Block 1 (yamumbi)/370 (sic)
  - c. An order declaring the acts of encroachment and trespass on the plaintiff's property as illegal and unlawful.
  - d. Costs and interest.
2. The Respondents filed a Defence denying the Appellant's allegations. They subsequently filed an Application dated 22<sup>nd</sup> November, 2019 seeking to issue a Third Party Notice against the National



Land Commission and the said application was granted on 26<sup>th</sup> November, 2019. The Appellants then served the Third Party Notice upon the National Land Commission and filed an Affidavit of Service sworn on 28<sup>th</sup> February, 2020.

3. The Respondent's counsel then fixed the case for hearing on 6<sup>th</sup> May, 2021 and served the Appellants with a hearing notice as evidenced by the Affidavit of Service sworn on 4<sup>th</sup> December 2020. When the matter came up for hearing on 6<sup>th</sup> May, 2021 the Appellants and their advocate failed to attend court and the Plaintiff proceeded with the case and the Defendant's case was marked as closed.
4. The trial magistrate delivered his judgment dated 26<sup>th</sup> August, 2021 based on the Respondent's evidence and entered judgment in favour of the Respondent in accordance with prayers in the Plaint.
5. It is the said judgment that provoked the instant appeal on the grounds that the trial magistrate erred in fact and in:
  - i. law in declaring that Respondent was the owner of land parcel number Kapsaret/kapsaret Block 1 (yamumbi)/1320 (sic) in total disregard of the fact that the subject land had been earmarked as a public utility and all parties heard on their evidence contrary to the rules of natural justice;
  - ii. Failing to consider all the matters before him and relying on procedural technicalities to deny the Appellant justice;
  - iii. Failing to take cognisance of the nature of the suit before him and the circumstances of the case and to allow for prosecution of the suit without the involvement of all the parties to the suit;
  - iv. Failing to not and to appreciate the fact that the Appellant was desirous of defending the suit, that being the reason he enjoined the third parties to the proceedings for effectual determination of the suit.
  - v. Failing to note that the Appellant being desirous of defending the suit filed an application to re-open the Respondent's case thereby condemning the Appellants unheard contrary to the rules of natural justice.
6. The court directed that the appeal be canvassed by way of written submissions and both parties duly filed their submissions.

### **Appellants' Submissions**

7. In his submissions dated 1<sup>st</sup> September, 2023 learned counsel for the Appellants submitted that the suit was fixed for hearing prematurely as no directions had been taken to confirm compliance with order 11 of the Civil Procedure Rules. He submitted that the Appellants filed an Application dated 6<sup>th</sup> July, 2021 seeking to set aside the proceedings of 9<sup>th</sup> June, 2021 (sic) where the court allowed the court allowed the case to proceed ex-parte and sought the re-opening of the suit to allow for cross-examination of the Plaintiff and taking of the Defendant's case but the said Application was not heard and instead the court proceeded to deliver its judgment.
8. It was his contention that the court arrived at its decision without hearing the Appellants contrary to the overriding objective under sections 1A and 1B of of the *Civil Procedure Act* which provides for the



just determination of civil disputes thus violating the provisions of Article 48 of *the Constitution*. He relied on the case of Onyango Oloo v A.G (1986-1989) E.A 456 where the Court held that:

“ There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participation in them”

9. Counsel was of the view that the failure of the trial court to hear both parties led to an unjust decision and further that the exclusion of the National Land Commission and Uasin Gishu Land Registrar which had been joined as a third party offended section 28 of the *Land Registration Act* which provides for overriding interests as well as Articles 62(3) and 67(2) of *the Constitution*.

### **Respondent's Submissions**

10. On his part learned counsel for the Respondent submitted that the judgment rendered by the trial court was factually and legally correct since the Respondent's evidence was not challenged by the Appellants. He relied on the cases of Edward Muriga through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997; Mortex KNIT Wear Limited v Gopitex KNIT Wear Mills Limited Nairobi Milimani HCCC No. 834 of 2002 and CMC Aviation Ltd v Crusair Ltd (1987)KLR 103 for the proposition that where the Defendant does not adduce evidence to challenge the Plaintiff's claim, the Plaintiff's case stands unchallenged.
11. He submitted that the Defendant's Application to re-open the case was never fixed for hearing and the Defendant cannot fault the court for failing to hear the same.
12. He is of the view that the judgment was entered in accordance with the evidence on record and with the relevant law and authorities.
13. The main issue for determination is whether the appeal has merit.

### **Analysis And Determination**

14. It is not in dispute that the suit in the lower court was set down for hearing after close of pleadings and that the Appellant's counsel was duly served with a hearing notice. The allegation that the suit was set down for hearing prematurely is neither here nor there as a perusal of the record shows that it was ripe for hearing since both parties had filed their documents and witness statements. Although the National Land Commission was served with a Third-Party Notice, they did not enter appearance and they could therefore not be forced to participate in the proceedings.
15. The Affidavit of Service sworn on 4<sup>th</sup> December, 2020 has a hearing notice duly stamped with the stamp of the firm of Martim & Company Advocates annexed to it as proof that they received the hearing notice. The allegation that the defendant was not served is therefore not true.
16. As regards the Application to set aside the Orders of 9<sup>th</sup> June, 2021, there is no indication that that the same was served upon the Plaintiff's counsel and fixed for hearing before judgment was delivered. In fact, the said Application though court stamped is not in the lower court file. What may have happened is that the application was filed when the file was already with the trial magistrate for writing of the judgment and it was therefore neither placed in the court file nor brought to the attention of the trial magistrate as there is no mention of it in the proceedings. I can therefore not fault the trial magistrate for failing to hear it.



17. On the question of the Defendant's Defence, it is trite that pleadings do not constitute evidence. As was clearly stated in the case of CMC Aviation Ltd v Crusair Ltd (1987) KLR 103:

“The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents”.

18. The Defendant's Defence without evidence to support it could therefore, not be used to challenge the Plaintiff's oral and documentary evidence adduced at the trial.

19. Order 12 Rule 2 of the Civil Procedure Rules provides for instances where the Defendant fails to attend the hearing after he has been duly served. The court is required to confirm that the Defendant was served before proceeding with the Plaintiff's case. In the instant case there is an affidavit on record indicating that the Appellants were served and they cannot be heard to complain they were condemned unheard.

20. Having carefully considered the Record of Appeal, the judgment and the parties' submissions as well as the authorities cited to me I am not persuaded that there is any good reason to interfere with judgement of the trial court.

21. Consequently, the appeal is dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 23<sup>RD</sup> DAY OF JANUARY 2024**

.....

**J.M ONYANGO**

**JUDGE**

In the virtual presence of;

Miss Kinyanjui for Mr. Mathai for the Respondent

Mr. Kipngetch for Mr. Martim for the Appellant

Court Assistant: H. Akidor

