Ayelel v Komorwo & another; Agricultural Finance Corporation & another (Interested Parties) (Environment and Land Appeal E013 of 2022) [2024] KEELC 850 (KLR) (21 February 2024) (Judgment)

Neutral citation: [2024] KEELC 850 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND APPEAL E013 OF 2022

FO NYAGAKA, J

FEBRUARY 21, 2024

BETWEEN

REUBEN KAKUKO AYELEL ..... APPELLANT

AND

KORCHOI MONRNYANGAI KOMORWO ..... 1ST RESPONDENT

JOSPHAT KASKUL LOKERIS ..... 2ND RESPONDENT

AND

AGRICULTURAL FINANCE CORPORATION ..... INTERESTED PARTY

LAND REGISTRAR WEST POKOT ..... INTERESTED PARTY

(Being an Appeal from the Ruling of the Hon. B. O. Ondego (SPM) delivered on 14/06/2022 in Kapenguria SPMCC ELC No. 5 of 2018)

JUDGMENT

Background

1. The Appellant herein filed Kapenguria SPMCC ELC No. 5 of 2018 on 01/03/2023. It was against the two parties named herein as the Respondents. His main claim was that he be declared the owner of 3½ acres being part of land parcel No. 383 Chepkono Adjuciation Area which he had allegedly bought from the Defendants now Respondents. The Respondents did not enter appearance in the lower court matter. It proceeded for formal proof and on 31/05/2018 the learned trial Magistrate entered judgment in his favour in terms of the Plaint and further ordered that the reliefs granted be effected within 60 days of the judgment.

2. Following that delivery of the judgment, the Plaintiff therein commenced execution of the decree. It was upon that execution that he discovered that the suit land was charged with the proposed 1st Interested Party. He could not thus effect the transfer of the 3½ acres whether through the Respondents or the Executive Officer of the Court into his name.

3. The Appellant then filed an Application dated 08/04/2022 in which he sought leave of the Court to enjoin the proposed Interested Parties as part of the proceedings; an order directing the 1st Proposed Interested Party to discharge the title certificate over land parcel No. 383 Chepkoni Adjudication Area and surrender it to the Court for purposes of transferring the part thereof ordered by the Court; in the alternative the 2nd Proposed Interested Party to be ordered to dispense with the original title to parcel No. 383 Chepkono Adjudication Area for the purpose of transferring the part of the suit land to the Plaintiff; an order directing the 2nd Proposed Interested Party to register transfer of the part of the suit lands and dispense with the verification process affecting the 1st Defendant; and costs of the Application.

4. The Court struck out the Application. Being aggrieved by the Order of the Court the Appellant moved this Court through the instant appeal.

The Appellant's Case

5. In his ruling delivered on 14/06/2022, the learned trial magistrate struck out the Appellant's Application dated 08/04/2022. He did so on the basis that the proposed Interested Parties could not be enjoined to the suit at the stage it was since the Court was functus officio in the matter and the Application was not for review of the judgment and even then, it was brought very late in the day. Additionally, that discharge of the suit land was a weighty issue which would involve varying of the contract between the parties and should have been canvassed earlier in the suit after all parties were served with pleadings thus it could not be raised now. Again, that the argument by the Plaintiff that the claim that the land was charged without evidence being adduced to that effect was flawed since the Appellant should have noticed this crucial development in the lands registry before filing the suit and acted appropriately. Further that if the land was charged there must have been always an agreement between the charger and chargee and the Court could not grant the prayers sought at the juncture of the suit at the time of the application. Lastly, that for the above reasons the application was procedurally flawed and the prayers sought were yet to be determined in the suit.

6. Dissatisfied with the decision, the Appellant instituted the instant Appeal through the Memorandum of Appeal dated 08/07/2022. It cited the following grounds of appeal;

    1. That the learned trial magistrate erred in law and in fact in his appreciation, apprehension and analysis of the application before him and thereby reached a grossly erroneous ruling.

    2. That learned Magistrate took into account things he ought not to have taken into account and applied wring principles of law with the inevitable result that he arbitrarily and unlawfully dismissed the Plaintiff's application.

    3. That the learned Magistrate erred both in law and fact in his findings that the Court was functus officio yet this was an application to execution judgment of the court.

    4. In his findings, the learned Magistrate failed to take into account the nature of the Application which did not seek to re-litigate the matter but rather to enforce the judgment delivered by the Court hence fundamentally erred in law and fact.

    5. That the learned Magistrate generally misdirected himself on the whole finding in his ruling.

7. The Appellant prayed for this Court to set aside the ruling impugned and substitute it with an appropriate finding and order; this Court allows the Application date 08/04/2022 as prayed, and costs.

Submissions

8. Neither the Appellant nor the Respondents filed submissions herein. Nevertheless, since submissions do not constitute pleadings or evidence, this Court proceeds to consider their absence immaterial and goes on to prepare the judgment herein based on the merits of the matter.

Issues, Analysis and Determination

9. The main issues for determination are as follows;

    i. Whether the Trial Court properly directed itself in addressing the issue of the Appellant's Locus Standi.

    ii. Depending on (i) above, whether the Trial Court property directed itself on the question of admissibility of the evidence before it.

    iii. The reliefs to be granted at this stage.

Analysis and Determination

10. Before I embark on the substance of the Appeal, it is important to restate the role of this Court as a first Appellate Court, noting that the appeal arises from the trial magistrate's exercise of discretion and reasoning over an Application. Thus, this Court is alive to the principle of law that it is not its duty to substitute its reasoning with that of the trial magistrate. Its obligation is to consider whether the trial magistrate exercised discretion judiciously and in making his finding he did not arrive at one that was manifestly wrong.

11. Further, this being a first Appeal, it is the obligation of this Court to evaluate the evidence before it and make a finding of its own. In *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, the Court of Appeal made the following remarks;

> " 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"

12. Similarly, in *Abok James Odera t/a A.J Odera & Associates -vs- John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the duty of the first appellate court was captured as follows;

> " 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-analyze 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"

13. This Court now addressed the issues sequentially.

i. Whether the trial court properly directed itself in addressing the issue of it being functus officio

14. The first issue this Court should consider is whether the trial court misdirected itself in its application of the doctrine of functus officio in order to determine the Application. What does it mean by functus officio? While expounding the doctrine of functus officio in Election Petitions Nos. 3, 4 & 5 *Raila Odinga & Others vs. IEBC & Others* [2013] eKLR the Supreme Court of Kenya cited with approval an excerpt from an article by Daniel Malan Pretorius, in "*The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law*," (2005) 122 SALJ 832. The excerpt is that;

> " The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

15. Further, in *Jersey Evening Post Limited vs Al Thani* [2002] JLR 542 at 550 the Court stated that:

> " A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available."

16. In regard to the instant appeal, the Appellant conducted his trial before the subordinate Court and obtained judgment in his favour as against the Defendants. He did not appeal or apply to set aside the judgment before he brought the Application dated 08/04/2022. He argues that the Application was not to re-litigate the suit but to perfect the decree of the court. The trial magistrate thought otherwise by finding that the application was brought too late in the day the Court having been functus officio, meaning the court having completed its work in the matter. In order to consider whether indeed the Court had completed its work or decided the matter with finality, this Court has to compare the doctrine with the prayers that the Appellant sought in the subordinate through the application which was struck out.

17. As noted above one of the prayers sought in the application dated 08/04/2022 was to enjoin the proposed interested parties therein: they are still proposed interested parties. It was the Appellant who sought to enjoin them. By the time he made the application the Court had determined the rights of the parties in relation to the suit that was before it. Further, the Appellant sought that the court issues a number of orders proposed interested parties, one was that the 1st Proposed Interested Party be ordered to discharge the suit property so as to facilitate the registration of the part thereof that the Court found was due to the Appellant. The other was that the 2nd Proposed Interested Party be ordered to dispense with the requirement of the availing of the original title for registration of the part of the suit land which the Court found as having been bought by the Plaintiff and also to register the said part in favour of the Plaintiff.

18. The above being the prayers in the Application this Court must answer whether the issues were indeed proper for determination after judgment had been entered. With regard to the issue of discharge of the charge in favour of the 1st Proposed Interested Party, it is indeed clear that the said proposed party

was not party to the proceedings that gave rise to the decree sought to be enforced in the manner the Application sought. Similarly, the 2nd Proposed Interested Party was not a party to the said proceedings and subsequent decree that was sought to be executed through the prayers sought. And as stated the trial Court had pronounced itself on the rights of the parties therein. In these circumstances, was the Court having anything to do regarding the rights of the parties or indeed any other proposed (interested) party in the said matter? This Court is of the humble view that the Court had made final orders in regard to the rights of the parties in the matter hence it was functus officio.

19. Furthermore, if the Court were to grant the prayers in the Application it would amount to it condemning the proposed interested parties unheard. What I mean is that even if the proposed interested parties were served with the application and they opposed it and the same was allowed that would still amount to condemning them against the rules of natural justice, the main one being that a party has a right to be heard. The issues ought to have been litigated before the Court at the time of trial and not through a post-judgment application. Thus, on this, the learned trail magistrate did not in any way err. He reasoned properly and judiciously.

20. In regard to the prayer of that the proposed interested parties be enjoined after judgment; this Court now considers how and when a party is enjoined to a matter. It is worth restating in this appeal that for a party to apply to and be enjoined in proceedings the same must be pending: the suit has to be at its youthful or nascent stage. It would be wholly unprocedural for one to seek to be enjoined to a matter after a decision has been made. Thus, when determining an application where a proposed party sought orders of joinder, the learned judge in *Elizabeth Nabangala Wekesa v Erick Omwamba & 3 others; Esther Momanyi Omwamba (Applicant)* [2021] eKLR held:-

> " The starting point in determining this Application is for the Court to satisfy itself that the suit herein is still pending before it. This is because, there is no doubt anymore that if a party wishes to be joined in a matter he or she must move the Court during the pendency of the proceedings in that matter. I draw guidance from the case of *Florence Nafula Ayodi & 5 Others v Jonathan Ayodi Ligure v John Tabalya Mukite & Another; Benson Girenge Kidiavai & 67 Others (applicants/intended Interested Parties)* [2021] eKLR. In the case, this Court held that where a party wishes to be enjoined to a matter, the proceedings in it must be either be at "the nascent or other stages but must be alive." Similarly, in *Leonard Kimeu Mwanthi v Rukaria M'twerandu M'iringu; Nathaniel Kithinji Ikiugu & 4 others (Intended Interested Parties)* [2021] eKLR, Lady Justice Mbugua J stated, "A party claiming to be enjoined in proceedings must have an interest in the pending litigation..."""

21. In *Hopf v Director of Survey & 2 Others; SAKAJA & 2 Others (interested Party)* (Environment & Land Case 4 of 2021) [2022] KEELC 6 (KLR) (4 May 2022) (Ruling) this Court held:

> " It is instructive to note that before a party is enjoined in a matter, the court ought to satisfy itself that the proceedings are alive. That means that the suit must still be pending before the Court. Therefore, the applicant must move the Court during the pendency of the proceedings in that matter."

22. From the foregoing, it is clear that for the Appellant to have moved the trial Court successfully regarding the intended joinder of the proposed Interested Parties, he ought to have done it while the proceedings were pending and in so doing, satisfy the principles in the *Francis Karioki Muratetu & another v. Republic & 5 Others* [2016] eKLR and *Trusted Society of Human Rights Alliance v. Mumo Matemo & 5 others* [2015] eKLR. Thus, it is my humble view that the learned trial magistrate was right when he held that the Plaintiff had moved the Court at a too late a stage. Additionally, he was

right in finding that it would not have been in order to allow deliberation of weighty matters such as discharging a security without a proper foundation of a suit and hearing all parties, and even of changing the terms of a contract between parties when it was not in issue. There is no matter that he took into account which he ought not have taken or he did not take into account which he ought to have taken, brief as his ruling was.

23. My findings above dispose of the 1, 2, 3 and 5 of the Memorandum of Appeal. It leaves me with the 4th ground of appeal only. The Appellant argued that the learned judge erred in law by failing to understand the nature of the Applicant in that it was not intended to re-litigate the matter but rather to enforce the judgment of the Court. If indeed that was the nature of the Application, it could not have sought to enjoin offices or parties who were not party to the proceedings before it was brought it. To do so was both unprocedural and a backdoor way of enforcing orders against parties who had not been given a hearing. The issues it sought to introduce through the prayers could only be properly canvassed before the Court by way of oral evidence and they were contentious. That being so, the Appellant had sought to re-litigate the matter on appeal. Hence the trail magistrate did not fail in error in his decision over the issue.

24. Lastly, before I give the final disposition of the Appeal, I note that the Application which was struck out combined prayers which, in my view were incompatible with it. I state so because first the Applicant sought to enjoin the proposed interested parties to the suit. That ought to have been the only prayer in the Application so much so that if it was granted, it could have paved way for the said proposed parties to be enjoined pursuant to the leave granted and then the pleadings would have been amended accordingly and the then interested parties be given opportunity to defendant their position or admit the claims against them.

25. The conclusion of the matter is that the entire appeal fails. It is dismissed with costs to the Respondents. The Application was heard on merits and determined. The trial magistrate ought to have dismissed rather than proceeding to strike it out because it was not found to be incompetent. I therefore substitute the order of striking out the application with an order dismissing the same with no order costs to the Respondents.

26. It is so Ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 21ST DAY OF FEBRUARY, 2024.

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC KITALE