



**Odhier v Onyango & another (Environment and Land Appeal
E009 of 2023) [2024] KEELC 724 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 724 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E009 OF 2023
AY KOROSS, J
FEBRUARY 15, 2024**

BETWEEN

GEORGE OMONDI ODHIER APPELLANT

AND

SYLVIAH NYANDIARE ONYANGO 1ST RESPONDENT

LAND REGISTRAR- SIAYA 2ND RESPONDENT

*(Being an appeal from the ruling of the CM Hon.M.O.Wambani
delivered on 16/03/2023 in Siaya ELC E40 of 2022 [OS])*

JUDGMENT

1. Before this court is an interlocutory appeal challenging the ruling of the learned trial magistrate in which she ignored her earlier directions that had ordered the appellant's originating summons (OS) dated 16/08/2022 be canvassed by written submissions and instead directed that it be heard by *viva voce* evidence. Having laid down this, it is paramount for this court to contextualize the background of this directions.
2. When this matter appeared before the learned trial magistrate on 6/10/2022, the appellant's counsel sought for it to be disposed by written submissions; this prayer was allowed. The court issued a mention date for further orders.
3. In is noted the 1st respondent's counsel was only served with a mention notice. There is no evidence the 2nd respondent who never entered appearance was ever served with this notice. The suit was subsequently mentioned severally but parties failed to attend.
4. Eventually, on 9/02/2023, the appellant's counsel attended court and informed the learned trial magistrate that the appellant's submissions had been filed and the suit was reserved for ruling on



16/03/2023. Later on, on that date, the 1st respondent's counsel who had been absent earlier in the day attended court and sought to raise an issue.

5. Upon hearing him, the learned trial magistrate directed that he raises the issue on 2/03/2023. However, not privy of the earlier directions, he sought for directions on disposal of the OS. Upon being notified that directions had earlier on been given, he was granted leave to put in submissions however, he did not file them. The learned trial magistrate then reserved the matter ruling.
6. In the impugned ruling, the learned trial magistrate stated that her decision was in respect of the appellant's prayer that the OS be canvassed by written directions. In it, the learned trial magistrate stated she had considered the OS and it would proceed by *viva voce* evidence and she expunged the submissions that had been filed by the appellant from the court record. In arriving at this decision, the learned trial magistrate reasoned that it would be fair and just.

Appeal to this court

7. The above outcome did not go down well with the appellant and aggrieved by the said ruling, the appellant preferred an appeal to this court on 4 grounds as set out in his memorandum of appeal dated 30/03/2023.
8. These grounds were repetitive and in condensation, they faulted the learned trial magistrate for inter alia; issuing new directions that the matter do proceed by *viva voce* evidence yet directions had already been issued on 6/10/2022, holding the appellant had made a prayer that the OS be canvassed by written submissions, erred in expunging submissions from the court record and misunderstanding the principles of judicious discretion.

Submissions

9. The appeal is canvassed by the appellant's written submissions dated 18/05/2023 and filed by the firm of M/s. Ayoo- See Associates Advocates. Despite service, the respondents did not file written submissions.
10. The 1st issue that is identified is whether the learned trial magistrate erred in her decision. Counsel argues the learned trial magistrate should have rendered a final determination on the OS and not made an interlocutory ruling and that there was no prayer before her that the OS be canvassed by written submissions since this had been considered and determined in previous directions.
11. Further, counsel submits the fresh directions had never been sought by any party, the learned trial magistrate did not exercise her judicious discretion properly and the ruling should be set aside *ex-debito justitiae*. Counsel relied on the case of *Mbogo & another v Shah* [1968] EA. On the 2nd issue, counsel sought for costs.

Issues for determination

10. As this is a first appeal, this court is called upon to re-evaluate, re-examine and reassess the evidence from the trial court and come up with its own deduction. Madan, JA (as he then was) succinctly stated the role of an appellate court in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] EA 898 as follows:

“The court of appeal will not interfere with the discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to various factors in the case. The court of appeal is only entitled to interfere if one or more of the following matters are established:



first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

10. Having evaluated the records and appellant’s submissions including relevant provisions of law and the well cited precedent, the issues which arise for resolution and shall be addressed simultaneously are as follows:-
 - I. Whether there was any prayer pending before the learned trial magistrate for the OS to be canvassed by written submissions.
 - II. Whether the learned trial magistrate exercised her judicious discretion properly.
 - III. What orders should this court issue.

Analysis and determination

I. Whether there was any prayer pending before the learned trial magistrate for the OS to be canvassed by written submissions.

12. It is only by examining the record that this court will render an informed decision on this issue and as highlighted earlier in this judgment, the learned trial magistrate had already granted the prayer for the OS to be canvassed by written submissions on 6/10/2022.
13. Having done so, the court could only set aside such an order and issue fresh directions. From the impugned ruling, it appears the learned trial magistrate by oversight overlooked her previous orders and this is so because she never referred to these earlier directions. For this reason, I find and hold that there was no pending prayer before the trial court on disposal of the OS by written submissions.

II. Whether the learned trial magistrate exercised her judicious discretion properly.

14. Section 3A of the [Civil Procedure Act](#) empowers the learned trial magistrate to issue necessary orders to ensure the ends of justice are met and by the provisions of Sections 1A and B of this Act, the trial court is called upon to conduct the courts business in a manner that is just, expeditious, proportionate, affordable and timely.
15. Order 37 Rule 18 of the [Civil Procedure Rules](#) on which the appellant’s originating summons is based upon provides that:

“At the time of directions, if the parties do not agree to the correctness and sufficiency of the facts set forth in the summons and affidavit, the judge may order the summons to be supported by such further evidence as he may deem necessary, and may give such directions as he may think just for the trial of any issues arising thereupon, and may make any amendments necessary to make the summons accord with existing facts, and to raise the matters in issue between the parties.”

16. Whilst Order 37 Rule 19 thereof states as follows: -

“(1) Where, on an originating summons under this Order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may,



in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to, or to apply for particulars of, those affidavits.

- (2) Where the court makes an order under subrule (1), Order 11 shall apply.
- (3) This rule applies notwithstanding that the cause could not have been begun by filing a plaint.
- (4) Any reference in these Rules to proceedings begun by a plaint shall, unless the context otherwise requires, be construed as including a reference to a cause proceeding under an order made under subrule (1).”

17. In *Mbogo & Another v Shab (Supra)* the court stated:

“...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 misjustice...”

18. *Black’s Law Dictionary, 8th edition, at page 499* has defined judicial discretion to mean: -

“The exercise of judgment by a judge or court based on what is fair under the circumstances guided by the rules and principles of law; a Court’s power to act or not to act when a litigant is not entitled to demand the act as a matter of right.”

19. In arriving at her decision, the learned trial magistrate stated that having considered the OS and on the basis of fairness, justice and facts, the matter should be heard by *viva voce* evidence. The learned trial magistrate then proceeded to expunge the filed submissions from the court record.

20. Although the trial magistrate had earlier on in the proceedings and in the presence of the appellant’s counsel directed that the matter does proceed by written submissions, this was not cast in stone and her hands were not tied for the life of the case.

21. I say so because in my view, the mischief behind Order 37 Rule 19 appreciated that at preliminary stages of giving directions on an OS, the court may not have grasped the nature of an applicant’s case or cause of action especially so if the facts of the case are disputed.

22. Thus, after such consideration and in exercise of judicious discretion which is based on fairness and justice, the court can issue further directions. I adopt the position of the Court of Appeal in *AHAD v CJE* [2019] eKLR which stated: -

“Where serious questions arise in a suit or where there are disputed facts relevant to the resolution of the dispute, an originating summons may not be the appropriate process. In that regard, Order 37 Rule 19(1) of the *Civil Procedure Rules* provides leeway.”

23. Turning to the facts of the OS, the appellant sought for removal of a caution over land parcel no. East Alego/Nyandiwa/3185 (suit property) which had been lodged by the 1st respondent. The appellant also prayed for an order of permanent injunction. These prayers were highly contested in the 1st respondent’s replying affidavit. She averred she occupied the suit property as of right since her husband had purchased it in 1972 from the appellant’s uncle one John Odhier Okech. The appellant filed a further affidavit deposed on 25/10/2022 which responded to the contested issues.



24. In my view, and as reasoned by the learned trial magistrate, these rival positions in the parties' rival affidavits could adequately and fairly be dealt with by *viva voce* evidence. This notwithstanding, the learned trial magistrate overlooked her previous directions and failed to convert the OS to a plaint and replying affidavit to a defence.
25. Nonetheless, by the provisions of Order 42 Rule 32 of the [Civil Procedure Rules](#), this court is empowered to issue such orders as should have been issued by the learned trial magistrate. See [Twaber Abdulkarim Mohamed v Independent Electoral & Boundaries Commission \(IEBC\) & 2 others](#) [2014] eKLR.
26. Thus, to the extent the learned trial magistrate made some technical errors which are curable, I have no reason to interfere with her exercise of discretion. I find and hold this ground of appeal fails.
27. Accordingly, and for the reasons stated above, the end result is that the appeal shall be allowed in part and each party shall bear their respective costs of the appeal. The lower court ruling is substituted in terms of the following disposal orders;
- a. The order directing the OS to be canvassed by written submissions is hereby set aside.
 - b. That the matter be mentioned before the trial court for purposes of directions as to the hearing and disposal of the suit by *viva voce* evidence.
 - c. That the trial court do give directions as to deeming the OS a plaint and replying affidavit a defence.
 - d. That the trial court do issue pre-trial directions as envisaged by Order 11 of the [Civil Procedure Rules](#).
 - e. As to the appeal, each party shall bear their respective costs.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 15TH DAY OF FEBRUARY 2024.

HON. A. Y. KOROSS

JUDGE

15/2/2024

Ruling delivered virtually through Microsoft Teams Video

Conferencing Platform in the Presence of:

N/A for the parties

Court assistant: Ishmael Orwa

