



Mjambili & another (Suing as the Administrator of the Estate of Peter Bambula Mjambili) v Amri & another (Civil Appeal 25 of 2019) [2025] KECA 886 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KECA 886 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL 25 OF 2019
F TUIYOTT, KI LAIBUTA & GWN MACHARIA, JJA
MARCH 21, 2025**

BETWEEN

WINNIE MWAKA MJAMBILI 1ST APPELLANT

MARK FANDE MJAMBILI 2ND APPELLANT

**SUING AS THE ADMINISTRATOR OF THE ESTATE OF PETER BAMBULA
MJAMBILI**

AND

AISHA SAID AMRI 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

(Being an appeal against the Ruling and Orders of the Environment and Land Court of Kenya at Malindi (J. O. Olola, J.) dated 29th November 2017 in Misc. App. No. 10 of 2017)

JUDGMENT

1. This is an appeal from the ruling of the Environment and Land Court at Malindi (J. O. Olola, J.) dated 29th November 2017 in Misc. Application No. 10 of 2017 in which the appellants sought orders to facilitate execution of the judgment and decree previously issued in favour of their deceased father in Mombasa HCCC No. 349 of 1998 and, subsequently, Malindi ELC Case No. 150 of 2015 (OS).
2. Briefly stated, the genesis of the appeal is that Peter Bamula Mujambili (now deceased) filed Malindi ELC Case No. 150 of 2015 (OS) vide an Originating Summons dated 9th September 2015 against Zumzug Investment Limited (Zumzug) and the Registrar of Lands, Kilifi. The deceased's case was that he was registered as the owner of plot No. XVII/13/212 situate in Mida, Malindi, measuring 45.31 acres (the suit property); that, in September 1998, he sold the suit property to Zumzug for Kshs. 10,000,000 vide a written sale agreement dated 17th September 1997; that Zumzug paid a deposit in the sum of Kshs. 1,000,000 and subsequently issued three cheques in the total sum of Kshs. 9,000,000,



which were dishonoured; and that, seeking specific performance of the sale agreement in the form of payment of the balance of the purchase price, he sued Zumzug and its directors, Amin Iblahi, Abdulla Kayoom Jamldi and Grace Wakhunga, in Mombasa HCCC No. 349 of 1998 in which summary judgment was delivered in his favour on 28th January 1999.

3. The deceased having failed to sell the suit property by way of private treaty in execution of his decree in Mombasa HCCC No. 349 of 1998 in view of the fact that it was already registered in Zumzug's name, he took out the Originating Summons seeking, inter alia, vesting orders to have the suit property registered in his name. In addition, he sought orders that the judgment debtors do comply with the vesting order within 14 days and, in default, judgment be entered in his favour against Zumzug; and that the costs of the application be borne by the defendants/respondents.
4. In its judgment dated 24th June 2016, the ELC (O. A. Angote, J.) observed that the defendants therein neither entered appearance nor filed a replying affidavit in response to the Summons; and that Zumzug was determined not to complete the transaction notwithstanding the fact that the suit property had been transferred and registered in its name. On the basis of the evidence before the court, the learned Judge allowed the Originating Summons as prayed. Soon thereafter, the deceased passed away on 12th August 2016.
5. Subsequently, the appellants herein, Winnie Mwaka Mjambili and Mark Fande Mjambili (suing as administrators of the Estate of the deceased) filed Misc. Application No. 10 of 2017 in the ELC at Malindi against the respondents herein, Aisha Said Amri and the National Land Commission (NLC), vide a Notice of Motion dated 27th March 2017.
6. In their Motion, the appellants sought orders that the 1st respondent be summoned to appear before the court to show cause why they were obstructing execution of the decree issued by the court vide the judgment and decree dated 24th June 2016; an order that the suit property decreed to the deceased be delivered to the appellants, and that any person bound by the decree who refuses to vacate be evicted; that one Bernard Sikhani Wanyonyi, a licensed surveyor, be authorised to undertake survey of the suit property to establish its boundaries and location in accord with the area's original survey plan; that the Commanding Officer, Watamu Police Station, do supervise and provide ample security for the survey exercise and eviction of unauthorised occupiers; and for costs of the application.
7. The appellants' application, which was supported by the 1st appellant's affidavit sworn on 27th March 2017, was premised on the grounds that: in its judgment dated 24th June 2016 in Malindi ELC Case No. 150 of 2015 (OS), the ELC issued vesting orders reverting title to the suit property to the deceased; that the 1st respondent, the owner of title No. Mida (Malindi) Plot No. XVII/14, claimed ownership of the suit property and refused to allow survey to be conducted to establish the boundaries and beacons defining the suit property despite knowledge that the property belonged to the appellants; and that the 1st respondent was laying claim of ownership of the suit property while the District Survey Map confirmed that she was not the owner thereof; that the 1st respondent was obstructing the execution of the decree, and that the appellants were unable to recover possession of the suit property; that the 1st respondent claimed that she had lodged a claim with the 2nd respondent, which claim had no basis; and that, in view of the decree issued by the court in favour of the deceased, nothing prevented the court from granting orders to facilitate execution of the decree as the issues in dispute had been settled.
8. In response to the appellants' Motion, the 1st respondent filed a replying affidavit sworn on 9th May 2017 deponing that she was a stranger to the judgment dated 24th June 2016 in ELC Case No. 150 of 2015 (OS) purportedly awarding the suit property to the deceased; that the parties in the said suit were strangers to her, and that they did not have any proprietary right or interest in the suit property, which belonged to her deceased grandfather; and that she was born and brought up in the suit property



where the 1st respondent, her family and their servants, agents and employees had carried out enormous developments thereon, including building houses and growing various crops thereon.

9. The 1st respondent further deponed that they suspected that the purported Zumzug Investment Limited was a creation of the appellants in a scheme aimed at deceiving the court into granting them favourable orders; that the court orders or decree could only be executed against the parties to the suit; that, since the 1st respondent was not a party to the said suit, granting the orders sought would condemn her unheard, and yet she was the true owner of the land; that she was a stranger to Mombasa HCCC No. 349 of 1998 and the judgment therein dated 28th January 1999; that the said judgment had not been executed for a period of 19 years; and that, on noticing the illegal actions and invasion on the land, the 1st respondent referred the dispute to the 2nd respondent for resolution.
10. In response to the 1st respondent's replying affidavit, the 2nd appellant filed a supplementary affidavit sworn on 2nd June 2017 deponing that the 1st respondent was not party to the suit due to the fact that she never had any proprietary rights over the suit property nor the locus standi in the suit; that the 1st respondent had never taken out letters of administration to the estate of her deceased grandfather nor annexed any grant to establish her legal capacity to administer the estate; that the suit property was transferred by Salebhai Hassanali Mamujee to the deceased on 3rd April 1975 and the transfer registered vide a Conveyance dated 22nd October 1977; and that the deceased was the owner of the suit property until 22nd October 1997 when he sold and transferred it to Zumzug.
11. The 2nd appellant further deponed that the 1st respondent's allegation that she had been brought up in the suit property where she and her family undertook enormous developments was untrue; that there were no crops on the suit property; that, in HCCC No. 349 of 1998, the Judge (P. N. Waki, J.) (as he then was) confirmed in his ruling that the land did not have any squatters, and that those alleged to be thereon were in fact on separate and different parcels of land; that Zumzug was not an imaginary person; that the Certificate of Postal Search as on 15th June 2005 confirmed that Zumzug was the registered owner of the suit property; that, after the decree was issued in ELC Case No. 150 of 2015 (OS) on 18th July 2016, the appellants proceeded to register the same as evidenced by the Certificate of Postal Search issued on 29th May 2017 indicating the appellants as the registered owners of the suit property; and that the appellants had properly moved the court to counter the obstruction to the execution of the decree by the respondent, who had no locus standi with regard to the suit property.
12. In its ruling dated 29th November 2017, the ELC (J. O. Olola, J.) held that the 1st respondent was not a party to the cases filed by the deceased with regard to the suit property; that the court had granted the vesting orders merely to restore the position in which the matter stood in 1998 when the suit property was registered in the name of the deceased; that the 1st respondent's contention that she had always lived on the suit property and had made enormous developments thereon was not contested; that it would be grossly unfair to evict the 1st respondent on the basis of the vesting order; that the 1st respondent's resistance was in good faith; and that a determination as to who was entitled to the suit land could not be made in the miscellaneous application. The court therefore dismissed the application with costs to the 1st respondent.
13. Aggrieved by the learned Judge's decision, the appellants filed the instant appeal on the grounds set out in their Memorandum of Appeal dated 23rd November 2018, namely that the learned Judge erred in law and in fact: in concluding that the appellants initially intended to sell the suit property, but resorted to have the land back in their name when the sale hit the headwinds; by entertaining the 1st respondent, who had no title to or proprietary interest in the suit property or letters of administration with reference to the suit property, and who had come to court with unclean hands which she attempted to sanitize by obtaining an order in the Kadhi's Court vesting the property to them on 16th August



2017; by failing to appreciate that, after final judgment was delivered on 24th June 2016, the court became functus officio; by failing to appreciate that the appellants held a clean title to the suit property while the 1st respondent had no valid document to establish ownership thereof; for entertaining the 1st respondent's case for the reason that they have carried out enormous development thereon, without any documentary evidence to establish ownership; and for failing to find that the 1st respondent had come to court in bad faith, as an afterthought, and without the locus standi or evidence of ownership of the suit property, all with intent to defeat the ends of justice.

14. In support of the appeal, counsel for the appellants, M/s. Martin Tindi & Co., filed written submissions dated 31st October 2024 urging us to allow the appeal.
15. In rebuttal, counsel for the 1st respondent, M/s. Muli & Ole Kina, filed written submissions dated 2nd November 2024. Counsel began by raising a preliminary objection, submitting that the appellants' Supplementary Record of Appeal filed and served on 30th October 2024 without leave ought to be expunged and the submissions based thereon disregarded.
16. In addition to the objection aforesaid, counsel cited the case of JMK v MWM & another [2015] eKLR for the proposition that a judgment that directly affects, or is likely to adversely affect, a party without affording him an opportunity to be heard amounts to violation of the principles of natural justice. In conclusion, counsel urged us to dismiss the appeal with costs.
17. In our considered view, the appeal stands or falls on our finding on two issues, namely: whether the Supplementary Record of Appeal ought to be expunged and the submissions based thereon disregarded; and whether the learned Judge erred in dismissing the appellants' Notice of Motion dated 27th March 2017.
18. On the 1st issue as to whether the appellants' supplementary record of appeal ought to be expunged and the related submissions disregarded, counsel for the 1st respondent submitted that the Supplementary Record of Appeal was filed and served by the appellants on 30th October 2024 without leave of the Court. According to counsel, while rule 94(3) of this Court's Rules provides that an appellant may file and serve a supplementary record of appeal, such a record must be relevant and not introduce extraneous matters not before the trial judge when the impugned ruling was delivered. Counsel prayed that we expunge the impugned Supplementary Record of Appeal and ignore the extraneous submissions contained in paragraphs 5 to 9 of the Appellant's submissions.
19. Counsel for the appellants made no submissions on this preliminary issue.
20. Rule 90 of the Court of Appeal Rules provides that:
 90. Where documents are omitted from the record of appeal Where a document referred to in rule 89(1) and (2) is omitted from the record of appeal, the appellant may, within fifteen days after lodging the record of appeal, without leave, include the document in a supplementary record of appeal filed under rule 94(3) and, thereafter, with leave of the deputy registrar on application.
21. Rule 94(3) reads:
 94. Preparation and service of supplementary record
 - (3) An appellant may, at any time, lodge in the appropriate registry four copies of a supplementary record of appeal and, as soon as practicable thereafter, serve copies of it on every respondent who has complied with requirements of rule 81.



22. In *I&M Bank Kenya Limited & another v Synergy Industrial Credit Limited & 2 others* [2024] KECA 855 (KLR), this Court, contrasting the latitude granted to the respondent (to file a supplementary record of appeal at any time and containing any documents of his choosing) to that granted to the appellant in an appeal, held that:

“63. This free and unfettered licence extended to the respondent in response to a record of appeal or other material lodged by the appellant is to be contrasted with the strictures imposed by the Rules on an appellant. I am of the view that sub-rule (3) of Rule 94 which seems to give an appellant freedom to lodge a supplementary record of appeal at ‘any time’ is probably misplaced. The proper, effective rule, given the manner in which the Rules are designed, is Rule 90 which sets out the contents of a supplementary record of appeal...”

64. Thus, for an appellant, what goes into the supplementary record of appeal is pre-determined by the Rules. Further, he is free to lodge such supplementary record of appeal, for purposes of including documents which he omitted from the record of appeal, without leave within 15 days after lodging the record. Should he seek to include such omitted documents outside of the 15 days, he would have to lodge the supplementary record of appeal only after applying for and obtaining leave from the deputy registrar of the Court.

64. Given that the documents in an appellant’s supplementary record of appeal are those that ought to have been, but were omitted from the record of appeal, it is arguable that the supplementary record is but an extension of the record of appeal. Should such supplementary record suffer any of the infirmities attracting the striking out of the record of appeal under Rule 86, such application would be sustainable.”

23. While the instant appeal was lodged in 2018 as appears from the record of appeal dated 23rd November 2018, the Supplementary Record of Appeal was filed and served on 30th October 2024, almost six years later, and without leave as required under rule 90 of this Court’s Rules. We also take to mind that the supplementary record contains a judgment of the Kadhi’s Court at Malindi dated 16th August 2017 rendered in a Succession Cause, judgments, rulings and orders of the High Court, the ELC and the Court of Appeal delivered or issued between 25th May 2018 and 10th November 2023, way after delivery of the impugned ruling dated 29th November 2017. To our mind, these documents constitute additional evidence that could only be introduced in the instant appeal on application under rule 31 of the Court of Appeal Rules. However, no such application was made.

24. In view of the foregoing, we find that the appellants’ Supplementary Record of Appeal is not properly on record and the same is hereby expunged. Consequently, the submissions based thereon are disregarded.

25. Turning to the 2nd issue as to whether the learned Judge was at fault in dismissing the appellants’ Motion, we first take to mind his observations in the following words:

“14. It is not in dispute that the 1st Respondent was not a party in the cases filed by the 1st Applicant’s husband since 1998 in regard to the suit land...”

15. That may indeed be true as the dispute at the time did not involve and hence did not require the presence of the 1st Respondent. It is however a different thing to try and evict the 1st Respondent on the basis of the earlier decisions of the Court... In his decision rendered on 28th January 1999, the Honourable Justice P.N. Waki (as he then was) found for the 1st Applicant’s husband. In the second instance, the Honourable Justice Angote granted vesting Orders in



Malindi ELC No. 150 of 2015 merely to restore the position in which the matter was in 1998 when the title to the suit land was in the name of the 1st Applicant's husband.

16. However while it is clear to me that title to the suit property is in the Applicant's name, I note from a perusal of the three Affidavits filed by the Applicants that the 1st Respondent's contention that she has always lived in the suit land and that she in fact made what she describes as "enormous developments" thereon has not been contested
....
15. Whatever the case, I think it would be grossly unfair to evict the 1st Respondent, who has demonstrated that she occupies at least part of the suit land, on the basis of the Vesting Order granted on 24th June 2016...
16. Instead, I am satisfied that the resistance and/or obstruction by the 1st Respondent is based in good faith on her own claim to be in possession of the property on her own right and a determination of who between herself and the Applicants is entitled to the suit land and/or portions thereof cannot be made by way of this miscellaneous application before me."
26. Faulting the learned Judge's findings, counsel for the appellants submitted that the 1st respondent has no basis for obstructing the decree holder from taking possession of the land; that no evidence was placed before the court to support the 1st respondent's allegation that they have done enormous and serious developments on the suit property; that the 1st respondent is in occupation of a separate parcel of land, namely Plot No. XVII/14 measuring 24.77 acres, as demonstrated by Deed Plan No. 3251; that, as evidenced by the Supplementary Record of Appeal filed by the respondents, the 1st respondent filed Malindi Kadhi's Court Succession Case No. 23 of 2017 on 16th August 2017 in respect of the suit property; that the 1st respondent had no title to the suit property and misled the Kadhi, who proceeded to grant her judgment; that on discovering what the 1st respondent had done, the appellants proceeded to appeal against the Kadhi's decision in Malindi HC Civil Appeal No. E012 of 2020; that, on 6th June 2023, the court found the appeal merited and set aside the Kadhi's Court's judgment; that the 1st respondent has no proprietary rights over the suit property, as the foundation of her claim collapsed; that the appellants' decree remains intact; and that the 1st respondent, who is party to Misc. Application No. 10 of 2017, also sought to be joined in Malindi ELC Civil Case No. 150 of 2015, which application was dismissed and their Civil Appeal No. 101 of 2018 dismissed by this Court vide a judgment dated 10th November 2023.
27. In rebuttal, counsel for the 1st respondent submitted that the 1st respondent was not party to the proceedings in HCCC No. 349 of 1998 where the court reverted the suit property to the deceased; that it is not in dispute that the 1st respondent claimed to have possession of the suit premises in her own right based on the fact that the land belonged to her grandfather; that she also claimed that she had developed the land extensively, and that it would be unfair to remove her from the suit premises without giving her an opportunity to defend herself; that the learned Judge considered the provisions of Order 22 rules 82 and 83 of the Civil Procedure Rules; that initiating execution proceedings under Order 22 rules 82 and 83 against a person who was not a defendant in the original case, and who is not instigated by the Defendant in that case but who has a claim as of right however remote, would be inappropriate for the reason that the court's jurisdiction in the original suit extends only to the parties who were properly brought before it; and that executing orders against a non-party would exceed this jurisdiction.
28. Counsel further submitted that the principles of natural justice require that a person be given an opportunity to be heard before any orders affecting their rights or interests are made; that allowing



execution against a non-party to proceedings in which a decree or order is issued would undermine the principles of procedural fairness inherent in the Civil Procedure Rules, and could lead to unjust outcomes; that the matter before the Judge in HCCC No. 349 of 1998 was an application for summary judgment based on failure by the Defendant in that case to pay the sums due from them on account of sale of the suit property, and yet the appellants are using the findings of the Judge that the land was free of squatters to cloud the real issue in the instant appeal; that the uncontroverted claim by the 1st respondent is that she is in possession of the suit property; and that the 1st respondent has a right to have the dispute between her and the appellants on the validity of the appellants' title and the issue as to whether the claim would be statute barred under sections 7 and 38 of the Limitation of Actions Act determined in the manner prescribed by law, and not in execution proceedings.

29. It is not lost to us that the appellants' application culminating in the impugned ruling was made pursuant to the provisions of Order 22 rules 82 and 83 of the Civil Procedure Rules which provide:

Resistance or obstruction to possession of immovable property [Order 22, rule 82]

1. Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the court complaining of such resistance or obstruction.
2. The court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

83. Resistance or obstruction by judgment-debtor [Order 22, rule 83]

Where the court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor, or by some other person at his instigation, it shall direct that the applicant be put into possession of the property, and, where the applicant is still resisted or obstructed in obtaining possession, the court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation, to be detained in prison for a period not exceeding thirty days.

30. In addition, Order 22 rule 84 provides:

84. Resistance or obstruction by bona fide claimant [Order 22, rule 84]

Where the court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the court shall make such orders as it may deem just.

31. We take to mind the fact that the 1st respondent was not the judgment-debtor in HCCC No. 439 of 2018 nor a party to ELC Case No. 150 of 2015 (OS). Neither did the appellants tender any evidence to demonstrate that the 1st respondent was acting at the instigation of the judgment debtor in those cases, whoever that debtor might have been. Accordingly, Order 22 rule 83 does not apply to the circumstances of this case.
32. While Order 22 rule 82 may apply, due consideration is required of the afore-cited provisions of Order 22 rule 84. The 1st respondent deponed in her replying affidavit sworn on 9th May 2017 that she was born on the suit property and had since resided thereon with her family where they undertook extensive developments, such as erecting houses and growing crops thereon. Apparently, the 1st respondent had



annexed a Certificate of Ownership indicating that the suit property allegedly belonged to her deceased grandfather. However, the page containing that annexure is surprisingly missing from the record.

33. On the other hand, in his supplementary affidavit sworn on 2nd June 2017, the 2nd appellant deponed that the 1st respondent lacked letters of administration to the estate of her late grandfather; that her contention as to occupation and development of the suit property was untrue; and that there were no crops on the said parcel of land. However, the appellants tabled no evidence to support their claim that there were no developments or crops grown on the suit property. In the absence of any definitive evidence from either party, the 1st respondent's resistance to execution of the decree on the basis of her family's long occupation of the suit property and her late grandfather's proprietary interest therein through a certificate of ownership appears to be in good faith. Accordingly, the parties' competing claims call for determination on evidence. In our considered view, the learned Judge cannot be faulted for declining to grant the appellants the orders sought. Neither was he in error in holding that a determination of the parties' competing claims could not be made under a miscellaneous application in execution proceedings.
34. In *Nairobi West Hospital Limited v Joseph Kariha & another* [2018] KEHC 1677 (KLR), Seron, J. correctly observed that a miscellaneous application was unsuitable where substantive orders are sought and "may not offer the parties the opportunity to be heard." In this case, the learned Judge made the appropriate orders. We agree with the learned Judge that the just determination of the contentious issues arising from the parties' pleadings could not be achieved in a summary manner, and that they would require a substantive claim to be instituted by either party and determined on evidence at a full trial.
35. Having considered the record of appeal, the grounds on which it is anchored, the rival submissions of learned counsel, the cited authorities and the law, we reach the inescapable conclusion that the appeal fails and is hereby dismissed. Consequently, the ruling and orders of the ELC at Malindi (J. O. Olola, J.) dated 29th November 2017 are hereby upheld.
36. Considering that the appeal involves representatives of estates of two deceased persons, we hereby order and direct that the parties bear their own costs.
37. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH, 2025

F. TUIYOTT

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed



DEPUTY REGISTRAR

