



**Njoki v Macharia (Environment and Land Appeal 91 of 2022)
[2024] KEELC 1535 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1535 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 91 OF 2022**

JG KEMEI, J

MARCH 20, 2024

BETWEEN

PETER GITHUA NJOKI APPELLANT

AND

MICHAEL MWANGI MACHARIA RESPONDENT

*(Being an appeal against the Ruling of Hon J A Agonda
PM delivered in MCLE 3 of 2021 at Ruiru on the 5/10/22)*

RULING

Introduction

1. This Appeal emanates from the trial Court’s Ruling in Ruiru MCL & E Case No. 3 of 2021 delivered on 5/10/2022. Aggrieved by the Ruling dismissing his Application dated 11/8/2022 the Applicant (now the Appellant), instituted this appeal vide a Memorandum of Appeal dated 14/10/2022 on the following grounds of appeal that; -
 - a. The Learned Magistrate erred in law and in fact in dismissing the Appellant’s Application without considering all the issues raised in the said Application.
 - b. That the learned trial magistrate erred in law and fact in failing to appreciate the fact that the Appellant is the legal and rightful owner of land parcel no. Ruiru East/Juja East Block 2/4047 (the suit land) having purchased the same from one Peter Mburu Waithaka, who had purchased the land at a public auction hence ought to have been enjoined in the suit as he had interests in the outcome of the suit.
 - c. The learned trial magistrate erred in and in fact in failing to appreciate the fact that Peter Mburu Waithaka and the Appellant herein were innocent purchasers for value without notice hence protected under section 99 of the *Land Act*.



- d. The learned trial magistrate erred in law and in fact in failing to enjoin the Appellant as a party to the proceedings in clear contravention of his rights of access to justice and to a fair hearing as envisaged under Articles 48 and 50 of the Constitution.
 - e. The learned trial magistrate erred in law and in fact in failing to appreciate the fact that when a property is charged, the chargee's interests in the property ranks highest.
 - f. The learned trial magistrate erred in law and in fact in failing to consider the fact that at the time the Respondent served the notices in the newspaper in the year 2018, the property was still charged to Kenya Finance Corporation Ltd, which had not intimated its intention to redeem the security, and it only did so in the year 2020, meaning that at the time the Appellant had no interest in the suit land hence could not have applied to be enjoined in the suit.
 - g. The learned trial magistrate erred in law and in fact in finding that the Appellant was guilty of laches whereas the Appellant obtained interest in the suit land on the 26th August 2021 while the advertisement of the existence of the suit was made on 13th December 2018, at a time the charge had not intimated its intention to sell the suit land.
 - h. The Learned trial magistrate erred in law and fact in failing to appreciate the history of the suit property which runs way back in the year 1992 when a charge was registered against it while the suit was instituted in the year 2018.
 - i. The Learned trial magistrate erred in law and fact in not considering the fact that the charge had not been sued yet the official search and the green card could show that the property had been charged to Kenya Finance Corporation Ltd even at the time of institution of the suit.
 - j. The Learned trial magistrate erred in law and fact in misunderstanding the actual Applicant in the Application as the Court stated that it was the Appellant herein who purchased the suit land whereas it was Peter Waithaka who had purchased the suit land at the public auction and then sold to the Appellant herein.
 - k. The Learned trial magistrate was unfair and arrived at the decision without due consideration of the law and the totality of the facts before her.
2. The Appellant urged this Court to allow his appeal; set aside the trial Court Ruling and issue an order for his joinder alongside Kenya Finance Corporation in the suit. The Appellant also prays for costs of the appeal.

The trial Court case

3. The suit in the trial Court originally commenced as Thika ELC 177 of 2018 filed by Michael Mwangi Macharia against Peter Wanganga and Another. The Plaintiff (now Respondent) inter alia prayed for an order of permanent injunction against the 1st Defendant from interfering with land parcel LR No. Ruiru East/Juja East Block 2/4047 (hereinafter the suit land). The suit was heard and determined albeit in the absence of the 1st Defendant but in the presence of the 2nd Defendant and allowed as prayed on 15/6/2022.
4. The Plaintiff proceeded to execute the said Judgment and in particular issued eviction notice dated 29/7/2022 addressed to all the illegal occupants on the suit Land. Upon receipt of the eviction notice, the Appellant moved the trial Court *vide* an Application dated 11/8/2022 seeking a raft of prayers including an order for temporary injunction against the Plaintiff from evicting, trespassing or



interfering with the suit land; an order for stay of execution of the decree dated 29/6/2022; setting aside of the *ex-parte* judgment and a prayer for joinder in the suit.

5. Briefly, the gist of the Application in the trial Court was that the Applicant purchased the suit land from one Peter Mburu Waithaka who had bought the land through a public auction on 6/10/2020. That the auction was instigated by Kenya Finance Corporation Limited in exercise of statutory power of sale after the then registered owner, Peter Wanganga (the 1st Defendant), defaulted to repay a loan of Kshs. 200,000/- advanced to him. That in respect of the suit, the Plaintiff never served the Applicant any of the Court pleadings save for the decree and eviction notice. Further the Plaintiff was accused of concealing material facts touching on the said public auction hence misleading the Court hence the Application.
6. In opposing the Application, the Plaintiff swore his Replying Affidavit on 2/9/2022. He deponed that he is the rightful owner of the suit land having bought shares from M/S Juja Farms Ltd in 1977 and issued with a certificate No. 885 and ballot No. 4484. That he was issued with a title deed on 30/10/1989 but later discovered that the 2nd Defendant had fraudulently transferred the suit land to the 1st Defendant. He proceeded to file his suit herein and since he did not know the 1st Defendant, he sought leave to serve the 1st Defendant by way of substituted service in the Daily Nation and the Standard on 13/12/2018. Upon delivery of Judgment in his favor, the Plaintiff avowed that he then instructed his advocates to issue eviction notices upon all persons who had trespassed on his land. He stated that the Applicant being a stranger to him, he could not serve him in a suit that he was not party to.
7. In its Ruling delivered on the 5/10/22, the Court discounted the issue of non-service of pleadings on the Applicant by relying on the substituted service in the national papers as sufficient for any persons staking a claim to the suit property to file relevant documents. The Court opined that the Applicant was well aware of the Court case and elected not to participate thus was too late in the day to seek the said orders to the chagrin of the Plaintiff who wished to enjoy the fruits of his Judgment. The Court dismissed the Application prompting the instant appeal.

The written submissions

8. On the 16/10/23 directions were taken to canvass the appeal by way of written submissions, which submissions were to be filed by the 29/11/23. By the time of writing this Ruling only the Respondent had complied with the directions of the Court with respect to the filing of written submissions. The Court will therefore render itself based on the record before it.
9. The Respondent had filed his submissions dated 15/11/2022 through the firm of C. Kimathi & Co. Advocates. Four issues were drawn for determination to wit; whether the trial Court erred in dismissing the Appellant's Application; whether a 1st registration can be canceled without involving the first registered owner; whether land that is acquired fraudulently can pass on to 3rd parties and whether the Applicant's case is merited. It was wholly submitted that the trial Court did not err in its determination; that no third parties can acquire any rights over the property because one cannot pass a title that he/she lacks and that the Appellant is a victim of fraud who should seek his remedies from whoever sold him the land. The Court was urged to dismiss the appeal with costs.

Analysis & determination

10. Having considered the pleadings and record before the Court, it is my view that the sole issue for determination is whether the appeal is merited



11. As a first appellate Court, this Court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The Court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This duty is enunciated by Section 78 of the *Civil Procedure Act* which espouses the role of a first appellate Court which is to:

‘... re-evaluate, reassess and re-analyze the extracts of the record and draw its own conclusions.’
12. The Appellant’s appeal impugns the trial Court decision to dismiss his Application precipitated by service of a notice of eviction against him. It is his case that he rightly acquired the suit land from one Peter Waithaka who had bought the suit land in a public auction. That the auction was pursuant to KFC Limited’s exercise of statutory power of sale after default of loan repayment advanced to the 1st Defendant for the amount of Kshs. 2M in 1992. The Appellant pleaded that he was not aware of the instant suit and did not participate for want of service of pleadings upon him.
13. In rebuttal, the Respondent maintained that he is the legal owner of the suit land and averred that having failed to trace the 1st Defendant, he opted to serve him by way of substituted service in the Daily Nation. He further stated at para. 13 of his RA that upon delivery of Judgment in his favor, he instructed his Advocates to issue a notice of eviction on all persons who had trespassed on his land. He conceded that he did not serve the Appellant since according to him, the Appellant was not party to the suit.
14. The trial Court delivered its Ruling on 5/10/2022 and in dismissing the Application, held that the Respondent effected served by advertisement in the daily newspapers notifying the public of the existence of the case and any person interested in the suit ought to have filed their respective responses. Further that evidence was led by the Appellant that he visited the suit land and found the Appellant and the Court was of the view that this was the opportunity for Appellant to participate in the suit with leave of the Court but he did not and therefore he cannot feign ignorance of the suit post judgement.
15. It is evident that the Respondent’s case in the trial Court was against the Defendants who are not party in this appeal. His cause of action was specifically for permanent injunction against Peter Wanganga and /or his servants, agents; cancellation of Peter Wanganga’s registration and for his land to revert to his name. This Court is in agreement with the Learned Hon Magistrate that the Respondent could not have served the Appellant as he was not party to the suit. The appeal fails on this ground.
16. The 2nd Defendant entered appearance and filed statement of defence dated 16/9/2019. The 2nd Defendant denied the Respondent’s claim and put him to strict proof. In particular 2nd Defendant refuted the allegation that the land registrar cancelled the Respondent’s name from the register of the suit land. That without prejudice, if the 2nd Defendant registered the 1st Defendant in the suit land register, the same was done based on the documents presented before it and under genuine belief that they were genuine.
17. On the other hand, the Appellant’s Application was based on grounds inter alia that he purchased the land from Peter Mburu Waithaka for Kshs. 8M and the impugned Judgment is thus irregular. No evidence of the said purchase or payment of the purchase price was filed in Court. Instead the Appellant deposed that Peter had no business defending the suit against him since the suit land had long been auctioned and therefore had no interest in the land. That it is the Appellant as bona fide purchaser of the suit land who stood to lose greatly if the land reverted to the Respondent’s name. By his admission, the Appellant avowed that his attempts to register the suit land in his name were upset by the existence of this suit in Court. The averments in Ground 2 of the Memorandum of Appeal



that the Appellant was the legal and rightful owner of the suit land in my considered view raises new issues that are yet to be heard and determined by the Court. Ground Nos. 2, 3, 5, 6, 7, 8, 9 & 10 of the memorandum of appeal fail and the Court finds no grounds to fault the trial Court in arriving at its conclusion as I have done.

18. Did the Appellant establish grounds for joinder in the suit? Ground 4 of the appeal faults the Court for failing to enjoin the Appellant as a party to the proceedings in clear breach of his right to be heard. The law on joinder of a party in a suit is found in Order 1 rule 10(2) *Civil Procedure Rules* that;

“(2) The Court may at any stage of the proceedings, either upon or without the Application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

19. My reading of the above provision is that joinder is permitted at any stage of the proceedings. The case in the trial Court was filed on the 12/6/2018 and determined by the Court on the 15/6/2022. The Application brought by the Appellant seeking interalia for joinder was filed on the 11/8/2022, about two months after the Court had pronounced itself on the rights of the parties to the suit. As already stated the Appellant was not a party to the suit. It therefore follows that by the time the Appellant filed his Application for joinder the Court had become functus officio having heard and determined the controversial issues in the suit.

20. In the case of *Jersey Evening Post Limited Vs Al Thani* [2002] JLR 542 at 550 it was observed that;

“A Court of 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 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.”

21. Similarly, functus officio is defined in *Black's Law Dictionary* Ninth Edition as [having performed his or her office] (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been accomplished. I find that it was not available for the Court to grant any orders enjoining a party to a suit that was spent. What remained of the Court are actions contemplated under Order 22 of the *Civil Procedure Rules* for purposes of facilitation of the execution of the Court orders, one of which does not include joinder.

22. The Supreme Court in declining an Application for joinder for an Applicant who was not a party in the Court of Appeal and High Court in the case of *Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 others* [2014] eKLR had this to say on the issue of joinder;

“(27) We cannot exercise our discretion to enjoin a party that disguises itself as an Interested Party, while in actual fact merely seeking to institute fresh cause. On



this point, we are guided by the principle which we had pronounced in the Mumo Matemo case (at paragraph 24), as follows:

“A suit in Court is a ‘solemn’ process, ‘owned’ solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings.”

23. The case before the trial Court was filed by the Respondent. In agitating his claim, the Respondent was well within his rights to choose who to sue and he sued the Defendants as discussed in para. 15 above.
24. Accordingly considering the material and evidence placed before the trial Court and exercise of its discretion in dismissing the Appellant’s Application, I find no fault to warrant interference by this Court.
25. The upshot of the analysis of the pleadings and findings of the trial lead to but one conclusion. The trial Court did not err in reaching its findings and this Court is not persuaded to overturn the impugned Ruling.
26. It is trite that costs follow event. Section 27 of the Civil Procedure Act provides that costs shall be in the discretion of the Court and ordinarily shall follow the event unless the Court for good reason otherwise order.
27. In the end the appeal is bereft of merit and it is for dismissal with costs in favour of the Respondent.
28. Orders accordingly.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 20TH DAY OF MARCH, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Kololo HB Wanjiru Njehia for Appellant

Kimathi for Respondent

Court Assistants – Phyllis/Oliver

