Mwadzaya v County Government of Kilifi & another (Civil Appeal 46 of 2019) [2025] KECA 869 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KECA 869 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL 46 OF 2019

SG KAIRU, DK MUSINGA & AK MURGOR, JJA

MAY 23, 2025

BETWEEN

RASSUL N. MWADZAYA ..... APPELLANT

AND

COUNTY GOVERNMENT OF KILIFI ..... 1ST RESPONDENT

THE SECRETARY, COUNTY GOVERNMENT OF KILIFI .... 2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of the Land and Environment Court of Kenya at Malindi (Olola, J.) delivered on 14th March 2019) in E.L.C Case No. 21 of 2015)

JUDGMENT

1. The appellant was the plaintiff before the trial court, where he had filled a suit against the respondents. He stated that he is the registered allottee of a parcel of land known as Plot No. 8 situate at Mariakani Town, more specifically known as LR.11492/350, (hereinafter "the suit property") having purchased the same and issued with an allotment letter sometime in 1994.

2. The appellant sought orders of injunction and certiorari against the respondents, following a 14 days' notice of demolition of the suit property that had been issued by the respondents. The respondents alleged that the suit property had encroached into a road reserve.

3. The respondents in their joint statement of defence contended that the appellant had put up the suit property without approved building plans and proceeded to occupy it without a certificate of completion. The notice of demolition was therefore lawfully issued, the respondents argued.

4. During the hearing of the suit, the appellant testified that he had been in occupation of the suit property since 1994 and stated that the suit property does not encroach into any road reserve. The appellant called one Mr. Edward Kiguru, a Land Surveyor, who testified and produced a survey report

that showed that the buildings on the suit property were within the plot boundaries and had not encroached into the road reserve.

5. However, the appellant conceded that he had not obtained any approval in writing to put up the buildings. He stated that he applied for approval but did not get any response. Subsequently, he sought and obtained the approval verbally, he stated.

6. The respondents, though served with a hearing notice, did not attend court when the suit came up for hearing.

7. The learned judge held that although the appellant had demonstrated that the suit property had not encroached into the road reserve, it was undisputable that the appellant had developed the suit property without any approval by the respondents, thus violating the provisions of section 30(a) of the Physical Planning Act which states as follows:

> " 30(a). No person shall carry out developments within the area of a local authority without a development permission granted by the local authority under section 33."

8. The learned judge further held that an injunction, being an equitable remedy, and the appellant having failed to prove that he had complied with the mandatory provisions of the above quoted law, no injunction could issue in his favour. The court therefore dismissed the suit and ordered each party to bear its own costs.

9. Being aggrieved by the said judgment, the appellant preferred an appeal to this Court. The appellant stated that the learned judge erred in law in: dismissing the appeal on matters that were not before the court for consideration and on which no evidence had been led; failing to evaluate and analyse the uncontroverted evidence that the suit property was not on a road reserve; and failing to properly exercise his discretion with regard to the reliefs sought.

10. During the hearing of the appeal, the learned counsel for the appellant, Mr. Kilonzo, made brief highlights of his written submissions. Equally, Mr. Kibara, learned counsel for the respondents also highlighted his written submissions.

11. The gravamen of the appeal is that the learned judge erred in law in dismissing the appellant's suit on issues and matters that were not before him for consideration, given that the respondents did not lead any evidence to prove that the buildings on the suit property were developed without approval; and that the appellant had demonstrated that the suit property was not standing on a road reserve as stated in the demolition notice that had been issued by the respondents.

12. The appellant further submitted that the learned judge did not evaluate the evidence that was adduced before him.

13. The appellant's counsel cited this Court's decision in Mrao Ltd v First American Bank Ltd & 2 Others [2003] KLR 126 regarding the principles that guide this Court in interfering with the exercise of a court's discretion.

14. Regarding the learned judge's determination of the suit on a matter that had not been pleaded nor argued, the appellant's counsel cited this Court's decision in Kenya Commercial Bank Ltd v Mwanzau Mbaluka & Another, Civil Appeal No.274 0f 1997 where the Court held that by the trial judge raising and determining the suit on an issue that was neither pleaded nor evidence adduced, a new cause of action against the appellant had been introduced.

15. On the other hand, the respondents' counsel submitted that the learned judge exercised his discretion in a judicial manner, saying that the appellant, having sought a discretionary remedy, the trial court could not have granted a discretionary remedy to a party who had not come to court with clean hands. Counsel cited this Court's decision in John Njue Nyaga & Another v Nicholas Njiru Nyaga & Another [2013] eKLR. The appellant had admitted that he developed the buildings without written approval by the respondents.

16. Consequently, Mr. Kibara urged the Court not to interfere with the learned judge's discretion.

17. We have considered the record of appeal, the submissions and the authorities cited by counsel. It is not in dispute that the notice dated 4th February, 2015 that was issued by the respondents to the appellant stated that the appellant had erected his buildings on a public road reserve.

18. In their statement of defence, the respondents stated, inter alia, that the appellant had put up his buildings without the relevant approvals, thus contravening County Government Building Laws and the Physical Planning Act, without giving the County Government a Notice of Inspection, and had occupied the illegal structures before obtaining a certificate of completion from the second respondent. No reply to the statement of defence was filed.

19. The appellant adduced evidence to prove that the suit property was not on a public road reserve. However, the appellant conceded that the developments on the suit property were done without approval of the second respondent, thus violating the provisions of section 30(a) of the Physical Planning Act.

20. It did not escape the learned judge's attention that the notice that had been served upon the appellant was not worded in accordance with the admitted violations by the appellant. Having so observed, the judge went on to state:

> " 22. An injunction as it were is an equitable remedy. In light of the regulations aforesaid and the failure in (sic) the part of the plaintiff to prove that he had complied therewith, it is difficult to see how an order of injunction can be justified herein. Granting the orders sought herein would be tantamount to sanctioning the plaintiff's breach of the relevant provisions of the Physical Planning Act."

21. In the circumstances, it cannot be said that the trial court dismissed the appellant's suit on issues that were not before the court for consideration. The reasons for the dismissal of the suit were properly before the court and were conceded by the appellant. We therefore dismiss grounds 1, 2 and 3 of the appeal.

22. The last issue for our consideration is whether there is any basis for interfering with the exercise of discretion by the learned judge. In Mbogo & Another v Shah [1968] E.A 93, this Court held:

> " An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court 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 and has been clearly wrong in the exercise of the discretion and that as a result there has been misjustice."

23. In our view, the appellant did not demonstrate that the learned judge misdirected himself in any way as to warrant our interference.

24. All in all, we find this appeal lacking in merit and dismiss it in its entirety. The appellant shall bear the costs of the appeal.

25. Before we pen off, we must observe that there has been inordinate delay in the delivery of this judgment due to an oversight on the part of the Court, and hereby tender an apology to the parties. The appeal was heard on 26th November 2019 and was scheduled for delivery on 12th March 2020. Although the judgment was prepared in time, following closure of courts in March 2020 due to the Covid-19 pandemic, inadvertently it was not delivered, and none of the parties brought this to the attention of the Court until 6th March 2025 when the appellant's counsel wrote to this Court's Deputy Registrar enquiring about it. The oversight is regretted.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY MAY 2025.

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR