Mwangi v Nganga (Environment and Land Appeal E057 of 2022)
[2024] KEELC 1596 (KLR) (18 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1596 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL E057 OF 2022

BM EBOSO, J

MARCH 18, 2024

BETWEEN

REGINA NYAMBURA MWANGI ..... APPELLANT

AND

MONICAH NGENDO NGANGA ..... RESPONDENT

(Being an Appeal against the Judgment of Hon J. A AGONDA, Principal Magistrate, delivered on 24/1/2022 in Ruiru Senior Principal Magistrate Court MCL & E Case No. E054 of 2021)

JUDGMENT

Background

1. This appeal was filed on 4/7/2022. An amended memorandum of appeal was filed on 25/10/2023. The appeal challenges the Judgment rendered on 24/1/2022 by Hon J. A Agonda, Principal Magistrate, in Ruiru SPMC MCL & E Case No E053 of 2021. The dispute in the trial court revolved around the questions of ownership of a parcel of land located in Mugutha Area of Ruiru and validity of parallel titles which the parties to this appeal held in relation to the said land.

2. The respondent in this appeal was the plaintiff in the trial court. She held title number Ruiru/Mugutha Block 1/T. 3772, expressed as having been issued to her and entered in the land register on 13/4/2016 as entry number 4. The relevant land register was expressed as having been opened on 18/8/2014 in the name of Nyakinyua Investments Limited. The acreage of the land comprised in the title was captured in the said title as 0.225 of a hectare. The title deed did not indicate the Registry Map Sheet Number on which the parcel was located.

3. On her part, the appellant held title number Ruiru/Mugutha Block 1/3772 [without the prefix "T" as part of the parcel number]. The appellant's title was expressed as having been issued to her on 5/8/2013 following a registration that was made in the relevant land register on 2/8/2013. The relevant land register was expressed as having been opened on 2/8/2013 in the name of Nyakinyua Investment

Limited. The acreage of the land comprised in the title was captured as 0.125 of a hectare. The title indicated that the parcel was located on Registry Map Sheet Number 5.

4. The suit land was alleged to be a subdivision in a subdivision scheme that was owned by M/s Nyakinyua Investments Ltd. Indeed, as observed above, the parallel land registers that were placed before the trial court indicated that they were opened on different dates in the name of Nyakinyua Investment Limited. For reasons that are unclear, the said company [which carried out the subdivision survey] was never joined as a party to the case in the trial court. Similarly, the Directorate of Survey [which authenticated and held the relevant survey records] was never joined as a party to the case. Although the Land Registrar was made a party to the case, he neither filed pleadings in the case nor tendered evidence during trial.

5. The respondent initiated the primary suit in which she sought, among other reliefs, orders nullifying the title held by the appellant. The appellant filed a defence and a counterclaim. Through the counterclaim, the appellant sought, among other reliefs, an order nullifying the title held by the respondent.

6. During trial, the respondent testified as PW1 and called one witness who testified as PW2. She did not lead evidence by: (i) the owner of the subdivision scheme; (ii) the Directorate of Survey; and (iii) the Land Registrar. The appellant testified as DW1 and closed her case without leading evidence by any of the above.

7. During trial, it was alleged that there had been a previous litigation relating to the "subject property" at the Thika Chief Magistrate in Civil Case No 187 of 2000 between Felista Wamaitha Thuo [predecessor in title to Monica Ngendo Ng'ang'a – the respondent] and Nyakinyua Investment Ltd, in which the latter failed to enter appearance and the late Felista Wamaitha Thuo obtained an ex-parte judgement. The exhibited documents relating to the previous proceedings are, however, not legible.

8. Upon conclusion of trial and upon receiving submissions, the trial court rendered the impugned Judgment in which it upheld the respondent's title and annulled the appellant's title.

Post-Judgment Review Application

9. A perusal of the original record of the trial court reveals that on 1/3/2022, the appellant filed an application under Section 80 of the *Civil Procedure Act* and Order 45 rules 1, 2 and 3 of the Civil Procedure Rules seeking a review of the impugned Judgment. The appellant fully prosecuted the application and obtained a determination on the merits of the application through a ruling rendered by the trial court on 28/4/2022. The trial court dismissed the application for lack of merit.

Appeal

10. Two months after the appellant's application for review was

dismissed by the trial court for lack of merit, the appellant brought this appeal, challenging the same Judgment of the trial court. The appeal raises the same grounds as those that the appellant raised in the application for review in the trial court. For reasons that only the appellant knows, she did not disclose to this court the fact that she had fully prosecuted an application for review of the Judgment under Section 80 of the *Civil Procedure Act* and she had obtained a merit determination on the application prior to filing this appeal.

11. Also concealed from this court are the particulars of the order which enlarged time for instituting an appeal against the Judgment of the trial court which was rendered on 24/1/2022. By dint of the provision of Section 79G of the *Civil Procedure Act*, the limitation period for lodging an appeal against

the impugned Judgment lapsed on 23/2/2022. For the appellant to initiate an appeal on 4/7/2022, she needed to first obtain an order enlarging time. She neither availed a copy of the time enlarging order nor disclosed its particulars in the memorandum of appeal.

Jurisdictional Questions

12. The two issues relating to post judgment review application and lack of time enlarging order raise two pertinent jurisdictional questions that call for prior disposal. The two jurisdictional issues came to the fore when the court was preparing to write this Judgement after the original record of the trial court had been availed and perused.

13. It is important to observe that it took a formal order in the following terms before the trial court record was availed.

> "This appeal file is coming up for Judgment tomorrow, 31/5/2023. The original record of the Trial Court has not been availed. The Court Administrator shall liaise with the Court Registry at Ruiru and cause the original record of the trial court to be availed to enable this court prepare the Judgment. A copy of this order shall be extracted and served appropriately."

14. Does this court have jurisdiction to entertain this appeal given that the appellant prosecuted an application for review and obtained a determination on it from the trial court? Our superior courts have been categorical that review mechanism under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules and an appeal mechanism under Orders 42 and 43 of the Civil Procedure Rules cannot be pursued concurrently. A party aggrieved by a decision of a court has to elect either to pursue a review or an appeal against the decision. Pursuing both mechanisms is an abuse of the process of the court.

15. Emphasizing the above legal position, the Supreme Court of Kenya stated the following in University of Eldoret & another v Hosea Sitienei & 3 others [2020] eKLR:

> "It is evident that following the decision of the Court of Appeal, the applicants were faced with two options – to, either file for review of the decision to the same court or pursue an appeal before this court within either of the applicable jurisdictional contours. The applicants, as advised by their advocates, chose the former. We agree with the applicants' advocates that they could not concurrently pursue both options as that would be an outright abuse of judicial process. However, following from our decision in Fahim Yasin Twaha v Timamy Issa Abdalla & 2 Others [2015] eKLR, where a litigant has more than one option to pursue, he/ she must settle on one of them. The decision on which course to pursue is taken in advance and once it is taken, the other option is no longer available or placed in abeyance to be reverted to at a later stage in the event the initial option does not succeed. This means that when choosing, the litigant is expected to choose the best available option since she may not have any further recourse."

16. The Court of Appeal similarly outlined the above law in Multichoice (Kenya) Ltd v Wananchi Group Kenya Limited & 2 others [2020] eKLR in the following words:-

> "In concluding this limb of the judgment, it has to be stressed that the legal policy of Order 45 is to prevent a party against whom judgment has been passed, from availing himself of two remedies at one and the same time; to apply for a review in the court below while his appeal (not notice of appeal) is pending in the Court of Appeal. It is now an accepted view

that both the Civil Procedure Rules and the Court of Appeal Rules did not contemplate the simultaneous proceedings of review and appeal before two different courts at the same time. Where a party has filed an appeal but subsequently wishes to apply to the court from which the appeal came to review the decision impugned, that party must, in the first place, withdraw the appeal.

17. It is clear from the above legal principle that once the appellant pursued the option of review and obtained a determination on the application for review, she lost the option of the mechanism of an appeal in this court against the impugned Judgment. She can only lodge an appeal against the ruling rendered on her application for review. It therefore follows that this court has no jurisdiction to entertain this appeal.

18. Apart from the above fatal element which divests jurisdiction from this court, the appellant filed this appeal outside the limitation period that is prescribed under Section 79G of the *Civil Procedure Act*. She did not bother to place before this court a copy of the order which enlarged the time for lodging an appeal. She did not disclose the particulars of the cause in which an enlargement order was obtained nor the particulars of the order itself. In the absence of an order enlarging the limitation period, the appeal is fatally incompetent and this court has no jurisdiction to entertain it.

19. For the above reasons, this appeal is struck out without venturing into its merits. The appellant shall bear costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 18TH DAY OF MARCH 2024

B M EBOSO

JUDGE

In the Presence of: -

Mr Wainaina for the Respondent

Court Assistant: Hinga