



Amoth & 2 others v Duncan & 10 others (Environment and Land Appeal E002 of 2023) [2024] KEELC 1340 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1340 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E002 OF 2023
AY KOROSS, J
MARCH 14, 2024**

BETWEEN

**CORNEL RASANGA AMOTH 1ST APPELLANT
COUNTY GOVERNMENT OF SIAYA 2ND APPELLANT
LIVINGSTONE RAGEN AMOTH 3RD APPELLANT**

AND

**ANGAYO AMOTH DUNCAN 1ST RESPONDENT
WANGO AMOTH ERICK 2ND RESPONDENT
MBOYA AMOTH TOM 3RD RESPONDENT
OSCAR RAGEN OWIRA 4TH RESPONDENT
OLIVER RASANGA OWIRA 5TH RESPONDENT
ODHIAMBO OWIRA RAYMOND 6TH RESPONDENT
REBMAN OWIRA AMOTH 7TH RESPONDENT
ODUOR AMOTH 8TH RESPONDENT
JUMA AMOTH 9TH RESPONDENT
JULIUS OMUNYA AMOTH 10TH RESPONDENT
JOHN OMBURA AMOTH 11TH RESPONDENT**

(Being an appeal from the ruling of the CM Hon. M.O.Wambani delivered on 13/07/2023 in Siaya ELC 21 of 2019)



JUDGMENT

Background

1. The subject of this appeal emanates from a ruling rendered by the learned trial magistrate in respect of an undated application that was filed by the 2nd respondent on 11/01/2023. He was a plaintiff in the lower court suit.
2. Since he was and still is acting in person, understandably, the application was wanting in form and it was headed “application for orders for survey and boundary confirmation”. The 2nd respondent sought for an immediate survey and confirmation of boundaries over undisclosed parcels of land and joinder of West Kenya Sugar Company as a defendant in the proceedings.
3. In opposition to the application, the firm of Wasuna & Co. Advocates who were and still are on record for the appellants filed grounds of opposition dated 19/04/2023. They raised grounds *inter alia*: the application was a non-starter and an abuse of court process, it entailed a boundary dispute and the application was devoid of evidence and urged the learned trial magistrate to strike out the application.
4. The matter was canvassed by written submissions and in a ruling rendered on 13/07/2023, the learned trial magistrate reasoned that the court had to carry out substantive justice and it allowed the reliefs sought in the 2nd respondent’s application and ordered each party to bear their respective costs.

Appeal to this Court

5. The above outcome did not go down well with the appellants and aggrieved by the said ruling, the appellants preferred an appeal to this Court on 7 grounds as set out in their memorandum of appeal dated 30/03/2023.
6. These grounds were repetitive and in condensation into 4 grounds, they faulted the learned trial magistrate for *inter alia*; allowing the motion despite failure by the respondents tendering evidence to support their averments, issuing orders that were incapable of execution, relying on extraneous factors in arriving at her decision and issuing an order of joinder.
7. As directed by the court, the appeal is canvassed by written submissions with the appellants’ law firm on record Wasuna & Company Advocates filing theirs dated 6/11/2023 and the 2nd respondent filing his on 23/10/2023. It is noted the 2nd respondent filed further submissions and documents on 20/11/2023 however, they were expunged from the court record. The co-respondents did not file their respective submissions.

Appellants’ Submissions

8. The appellants’ submissions identifies several issues for determination but on examination, they are interrelated. From them, it arises 2 of the grounds of appeal are not advanced in the submissions namely; the learned trial magistrate issued unenforceable court orders and also considered extraneous factors. It can be concluded these grounds are abandoned.
9. On the ground of allowing the motion despite failure by the respondents tendering evidence to support their averments, counsel for the appellants contends the respondents failed to attach annexures to their application thus contravened the provision of Rule 9 of the Oaths and Statutory Declaration Rules.



10. According to counsel, in the absence of annexures, the application was unsustainable. To buttress his position, counsel relies on several authorities including the persuasive decision of *Solomon Omwega Omache & Another v. Zachary O. Ayieko & 2 others* (2016) eKLR.
11. On the issue of jurisdiction which is not a ground of appeal, the counsel argues the learned trial magistrate was by virtue of Sections 18 and 19 of the *Land Registration Act*, bereft of jurisdiction to entertain a boundary dispute and relies on the case of *Willis Ocholla v. Mary Ndege* Kisumu ELC Land Case No, 137 of 2015.
12. On the ground of joinder and relying on Order 1 Rule 10(2), counsel argues West Kenya Sugar Company was never given an opportunity to be heard before such an order was made and that no allegations had been made against it therefore, the learned trial magistrate exercised her discretion wrongly.

2nd Respondent's Submissions

13. The 2nd Respondent submits his application was supported by documents and the survey exercise is vital for the just determination of the suit. He submits he is frustrated by the actions of the appellants and West Kenya Sugar Company which has entered into a contract with some of the parties. He therefore urges this court to strike out the appeal with costs.

Issues for Determination.

14. 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 vs 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.”

15. Having evaluated the records and parties' rival submissions including relevant provisions of law, the issues which arise for resolution and shall be addressed simultaneously are the two 2 remnant grounds of appeal. These grounds shall be addressed in the following manner: -
 - I. Whether failure by the 2nd respondent to attach annexures to his affidavit rendered the application fatal.
 - II. Whether the learned trial magistrate erred in issuing an order of joinder.

Preliminary Issues

16. However, before I proceed, I must address certain preliminary issues that emerge from parties' submissions. The issue of the trial court's jurisdiction has been raised in the appellants' submissions and not in their grounds of appeal.



17. It must be noted the appellants were bound by grounds postulated in their memorandum of appeal and are not allowed to travel beyond them by sneaking new grounds in their submissions. This court will disregard this limb of their submissions. See *Kenya Hotels Ltd vs. Oriental Commercial Bank Ltd (Formerly known as The Delphis Bank Limited)* [2019] eKLR.
18. In addition, despite referring to authorities in their submissions, the appellants' counsel did not avail them to this court and for this reason, their cited authorities will similarly be disregarded. The same fate befalls provisions of law which counsel has failed to disclose the relevant statute.
19. Equally, the 2nd respondent introduced new evidence in his submissions and they will similarly be disregarded by this court. See *Kenya Hotels Ltd (supra)*. Parties are reminded submissions are arguments and not evidence. Having addressed these preliminary issues, I will now proceed to deal with the primary issues.

Analysis and Determination

I. Whether Failure by the 2nd Respondent to Attach Annexures to his Affidavit Rendered the Application Fatal.

20. An affidavit's form is provided for in Order 19 of the *Civil Procedure Rules* and in particular Rules 3, 4 and 5 thereof. By these provisions, the key ingredients of an affidavit which support an interlocutory application is that it must be on facts, within the deponent's knowledge and he is able to prove them (Order 19 Rule 3) and may comprise statements of information and belief showing the sources and grounds thereof (Order 19 Rule 3).
21. Further, the description, true place of abode and postal address of the deponent and disclosures of whether the deponent is an adult or minor must be made (Order 19 Rule 4) and lastly, be in first person and numbered in paragraphs. In addition the court is implored to disregard procedural technicalities (Order 19 Rules 7).
22. In allowing the application, the learned trial magistrate stated she had considered the issue of substantive justice. The appellants' argument is that before arriving at her decision, the learned trial magistrate should have first satisfied herself that annexures had been tendered to the court.
23. On this argument, I respectfully disagree with the counsel and I say so because neither Order 19 of the *Civil Procedure Rules* or the *Oaths and Statutory Declarations Act* places such a burden on a deponent.
24. The provision of Rule 9 of the *Oaths and Statutory Declaration Rules* which counsel relies upon is inapplicable to the circumstances of this case since it applies to exhibits annexed to affidavits and requires them to be securely sealed, commissioned and marked with serialization. Nonetheless, it does not bestow such a requirement on affidavits.
25. The 2nd respondent raised evidential facts in his affidavit and in opposition, the appellants did not rebut the averments therein by filing a replying affidavit under oath but instead, filed grounds of opposition dated 19/04/2023.
26. Since the grounds of opposition raised matters of law, the appellants did not deny the averments made in the 2nd respondent's affidavit and therefore, the averments therein stood. See *Guaca Stationers Limited & another v Inamdar & Inamdar* [2015] eKLR which was cited with approval in *Kennedy*



Otieno Odiyo & 12 Others vs Kenya Electricity Generating Company Limited [2010] eKLR where the court stated: -

“The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the application in its supporting affidavit. Thus what was deponed to was not entered nor rebutted by the Respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant’s supporting affidavit, means that the respondents have no claim against the applicant.”

Therefore, I conclude, find and hold that this ground of appeal fails.

II. Whether the Learned Trial Magistrate Erred in Issuing an Order of Joinder.

27. The legal framework for joining a party to court proceedings is set out in Order 1 Rule 10 (2) of the Civil Procedure Rules which states that:

“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.”

28. From this provision of law, it emerges the court may on its own motion or on application of any party to the proceedings as the circumstances herein, order joinder of a party. In the exercise of such discretion, the court must as a matter of cause, act according to reason, fairness and not according to its whims and caprice.

29. Order 1 Rule 3 of the Civil Procedure Rules outlines who a proper defendant is when it states as follows:

“All persons may be joined as Defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

30. While citing with approval the Supreme Court of Uganda case of *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [1999] 1 EA 55 (SCU), the case of *Julius Meme v Republic & another* [2004] eKLR quoted an extract of the decision of Mulenga, JSC in this Ugandan decision;

“The foregoing passage spawns certain principles which are opposite to the joinder of parties in a constitutional reference such as the present one: (i) joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings; (ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law; (iii) joinder to preempt a likely course of proliferated litigation.”

31. By Order 1 Rule 5 of the Civil Procedure Rules, it is not necessary for a defendant to be interested in all reliefs and Order 1 Rule 7 thereof allows a plaintiff when in doubt, to join two or more defendants in



order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.

32. In allowing the application, the learned trial magistrate stated she had considered substantive justice and will allow parties to reap benefits from their respective parcels of land.
33. It is counsel's argument the learned trial magistrate erred because West Kenya Sugar Company was not heard and reference had not been made against them either in the application, affidavit or witness statement.
34. Although I agree with counsel that it would have been proper for West Kenya Sugar Company to be served and be heard on the application, it is the considered of the view of this court that this is not fatal since this party will have an opportunity to present their pleadings before the trial court and of it so wishes, it can seek to be struck out from the proceedings.
35. From the record, I must mention it has been cumbersome to understand some of the documents filed by 2nd respondent before the trial court. I say so because he has haphazardly filed documents without laying a basis for them and the format of their contents are difficult to comprehend. Understandably, he is self-represented but maybe, it is time for him and other non-represented parties to seek the services of an advocate.
36. Be that as it may, in the plaint dated 5/03/2019, the respondents have sought compensation for crop harvest and in the witness statement that was filed on 3/03/2022, the 2nd respondent alleged the appellants had fraudulently leased the suit properties to West Kenya Sugar Company.
37. Ultimately, I find and hold that this appeal is devoid of merit. I hereby dismiss it and uphold the ruling of the learned trial court delivered on 13/07/2023 which allowed the application that was filed by the 2nd respondent on 11/01/2023. Accordingly, the appeal fails and is hereby dismissed. It is trite law costs follow the event and because some of the parties are siblings, each party shall bear their respective costs of this appeal.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 14TH DAY OF MARCH 2024.

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HON. A. Y. KOROSS

JUDGE

In the presence of:

Mr. Que for the Appellants.

N/A for Respondents

Court assistant: Ishmael Orwa

