Mramba v Mugambi (Civil Appeal E044 of 2021)
[2024] KECA 442 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KECA 442 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL E044 OF 2021

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

APRIL 12, 2024

BETWEEN

MARK KAZUNGU MRAMBA ..... APPELLANT

AND

BENEDETTE MWIKALI MUGAMBI ..... RESPONDENT

(Being an appeal against the Ruling and Order of (J. O Olola, J.) delivered on 31st August 2021 in Malindi ELC NO. 38 of 2020)

JUDGMENT

1. The genesis of this dispute can be traced to Malindi ELC Case No. 98 of 2017 [OS] - Mark Kazungu Mramba v Benedette Mwikali Mugambi, which was filed by the appellant, Mark Kazungu Mramba, against the respondent, Benedette Mwikali Mugambi, seeking to be declared as the proprietor of the suit premises being Plot No. LR No. 20252/3 Kilifi CR No. 30843, situate at Kilifi Township within Kilifi County, by virtue of adverse possession. By a judgement delivered therein on 13th May 2020, the claim was found unmerited and the suit dismissed with costs to the respondent.

2. Enthused by the said decision, the respondent herein instituted ELC Case No. 38 of 2020 based on the grounds that she is the registered owner of the suit property; that, since the appellant failed to prove that he had acquired the suit property by way of adverse possession, he was a trespasser thereon; that there was danger that the appellant would proceed to erect more structures on the land, or invite third parties to occupy the same in a bid to frustrate recovery thereof; and that the appellant's presence on the suit premises is and remains unlawful and/or illegal. According to the respondent, the orders of eviction could not have been issued in the earlier suit due to the peculiar procedure adopted in those proceedings, which was by way of originating summons, and in which a counterclaim could not have been made.

3. In her suit, the respondent filed Notice of Motion dated 15th June 2020 against the appellant seeking temporary injunction restraining the appellant, his agents, employees, servants, relatives or any other person(s) acting on his behalf from erecting any other or further structures thereon, or from dealing in any manner with the suit premises pending hearing and determination of the suit; a mandatory injunction directing the demolition of the appellant's structures on the suit premises or any other structures thereon pending hearing and determination of the suit; summary judgment against the appellant by way of issuance of eviction orders in respect of the suit premises and consequently handing over vacant possession of the same to the respondent; and costs of the application. The application was based on the same grounds as the suit.

4. In opposition, the Appellant filed a replying affidavit sworn by him on 23rd June 2020 wherein he admitted that the respondent was registered as the proprietor of the suit property, but averred that the registration was not in full compliance with the law. He averred that eviction orders ought to have been sought in Malindi ELC No.98 of 2017(OS) Mark Kazungu v Benedette Mwaikali Mugambi, and that the issuance of orders sought in the application at the interlocutory stage was akin to the court concluding the matter without hearing the parties. In his view, it was improper for the court to issue eviction orders since he had filed an appeal against the said decision.

5. On 31st August 2021, the learned trial Judge (J. O. Olola, J.) delivered his judgement in the matter in which he found that, given the nature of the pleadings brought in Malindi ELC No. 98 of 2017 against the respondent herein by way of an Originating Summons, there was very little room for filing a counterclaim; that the contention by the appellant that the suit by the respondent was time barred having been filed on 15th June, 2020, 15 years since 2006, was untenable since the court in Malindi, ELC No.98 of 2017 found that the respondent had previously made efforts to eject the appellant from the suit land and time could not run when the dispute was already in court; that, pursuant to Order 42 Rule 6 of the Civil Procedure Rules, no appeal or second appeal could act as a stay of execution or proceedings under a decree or order appealed from unless there was an order of stay from the court; that, in the premises, the appellant's defence did not raise any triable issues, and that the respondent's case was a proper one for summary judgment and eviction of the appellant from the suit property. The learned Judge allowed the respondent's application and directed the appellant to give vacant possession within 45 days, failure to which eviction would ensue at his costs.

6. Aggrieved by the said decision, the appellant appealed to this Court contending that the learned Judge erred: in finding that the respondent had little room in filing a counter claim in Malindi ELC No. 98 of 2017(OS); in failing to find that the appellant had raised a triable issue that the suit herein was time barred and/or had been caught up by the *Limitation of Actions Act*; in failing to find that the appellant had raised a triable issue that the suit herein was res judicata Kilifi SRMCC No.540 of 2010 and Malindi Civil Case No. 131 of 2012; in reaching a finding that the respondent could institute a suit for recovery of the suit property after dismissal of the appellant's suit to recover the same property; in concluding that Kilifi SRMCC No.540 of 2010 and Malindi Civil Case No. 131 of 2012 amounted to interruption in the computation of time; in failing to find that the application dated 15th June, 2020 was supported by a fatally defective affidavit; and in failing to consider the evidence adduced, the appellant's arguments, submissions and authorities when arriving at his decision. The appellant urged us to allow his appeal with costs.

7. When the appeal was called out for hearing on the GoTo virtual platform on 16th October 2023, learned counsel, Mr. Nyange, appeared for the appellant while learned counsel, Mr. Kenga, appeared for the respondent. Both counsel informed the Court that they had filed their written submissions, on which they wholly relied. However, we were unable to trace the appellant's submissions from our registry, and there was no record as to when the said submissions were allegedly filed. We wish to remind the parties

to ensure strict compliance with the directions given at the Court case management stage, particularly with regard to timelines for filing submissions. In our view, the directions on timelines given during the case management process are meant to ensure that parties have adequate time to prepare for their cases by knowing in good time the cases they are to meet. This is meant to avoid trial by ambush.

8. We have considered the record of appeal and the written submissions placed before us. We have considered those submissions, and need not reproduce them here.

9. This being a first appeal, this Court's mandate was espoused in Ng'ati Farmers' Co-Operative Society Ltd. Vs. Ledidi & 15 Others [2009] KLR 331 as follows:

> " An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

10. This mandate was reiterated in the case of Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2 EA 212 as follows:

> " On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

11. We are, however, conscious as cautioned by the predecessor to this Court in Peters vs. Sunday Post Ltd [1958] E.A 424 that:

> " It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion."

12. In our view, the issues that fall for determination in this appeal are as follows:

    i. Whether by failing to file a counterclaim in the suit filed by the respondent for adverse possession by way of Originating Summons, the respondent was precluded from instituting fresh proceedings.

    ii. Whether the subsequent proceedings instituted by the respondent were time barred.

    iii. Whether the respondent's suit was res judicata in light of Kilifi RMCC No. 540 of 2020 and Malindi Civil Case No. 131 of 2012.

    iv. Whether the affidavit in support of the application for summary judgement was defective.

v. Whether the learned Judge failed to consider the evidence and/or arguments and/or submissions and/or authorities tendered by the appellant.

13. On the first issue as to whether by failing to file a counterclaim in the suit filed by the respondent for adverse possession by way of Originating Summons, the respondent was precluded from instituting fresh proceedings, the law regarding the circumstances under which the procedure of originating summons may be appropriate in determining legal disputes was reiterated in Ng'ati Farmers' Co-Operative Society Ltd. Vs. Ledidi & 15 Others (supra) in the following terms:

> " The procedure by way of originating summons is intended to enable simple matters to be settled by the Court without the expense of bringing an action in the usual way, not to enable the Court to determine matters which involve a serious question. When it becomes obvious that the issues raise complex and contentious question of fact and law, a judge should dismiss the summons and leave the parties to pursue their claims by ordinary suit... The suit which gave rise to this appeal raised complex and contentious issues of both law and fact. It took many days spread over 4 years to hear it. Many witnesses were called to testify and several exhibits were produced. Above all, the suit property is not less than 16,000 acres and there are over 3,600 settlers in occupation. The suit could not, obviously, be resolved on an originating summons. We have anxiously considered the authorities cited in urging us to fault the procedure adopted by the respondents in mounting the counterclaim, but we are satisfied that it was not fatal to the claim. In reaching this conclusion we are guided by the fact that the issue of the wrong procedure did not invalidate the proceedings because it did not go to the jurisdiction of the court and no prejudice was caused to the appellant."

14. It is generally appreciated that the procedure of originating summons is intended to enable simple matters to be settled by the court without the expense of bringing an action in the usual way, and not to enable the court to determine matters which involve serious questions. Such procedure is primarily designed for summary and 'ad hoc' determination of points of law or construction or of certain questions of fact, or for obtaining specific directions of the court, such as trustees, administrators, or the court's own execution officers. That dispatch is the object of the proceedings is shown by Order 36, which provides that they shall be listed as soon as possible and be heard in chambers, unless adjourned by a Judge into court. See Mucheru vs. Mucheru [2000] 2 EA 455; Bhari vs. Khan [1965] EA 94; Kibutiri vs. Kibutiri [1982-1988] 1 KAR 60; Kenya Commercial Bank vs. James Osebe [1982-1988] 1 KAR 48; and Salemohamed Mohamed vs. Saldanha Mombasa HCCC No. 243 of 1953.

15. As held in the above-mentioned decision, it is not correct to state that counterclaims cannot be made in a suit commenced by originating summons, to that extent, the learned Judge erred.

16. That notwithstanding, a counterclaim, as held by Sir Udo Udoma, CJ. in Abyasali Musoke vs. Rene Dol [1963] EA 526:

> " is itself a separate action and does not depend on the original claim by the plaintiff. It is only for convenience that it is included in a statement of defence where it appears that the evidence required for the purpose of establishing the counterclaim would be the same as that required for the plaintiff's claim and that at the trial similar issues would fall for decision."

17. In view of the foregoing, but subject to the law on limitation, the respondent was not barred from bringing fresh proceedings upon dismissal of the appellant's claim as she did. As to whether the

respondent's suit was statutorily barred by limitation of time, the learned Judge expressed himself as hereunder:

> " The Defendant further submitted that since the court found in the judgment delivered on 13th may 2020 that he had been on the Suit land since 2006, this suit was time barred as the same having been filed on 15th June 2020 had come more than 15 years late. That contention is however spurious and untenable in law. As the court found in its judgement in Malindi ELC No. 98 of 2017 [OS], the Plaintiff and her deceased husband had previously made efforts to eject the Defendant from the land and time could not run when the dispute was already in court."

18. We agree with the learned Judge that, where attempts are made by a proprietor of land to eject a trespasser from the land, the running of time for the purposes of limitation is frozen, and such attempts amount to interruption of the possession. The same position applies where there is a dispute before the Court where rivalling contentions are made by the parties for determination by the court. In any case, as the appellant's contention that he had been in adverse possession of the suit land was found to be without merit, the appellant could not raise the same issue in these proceedings in order to defeat the respondent's claim.

19. As to whether the respondent's suit was res judicata in light of Kilifi RMCC No. 540 of 2020 and Malindi Civil Case No. 131 of 2012, since that defence was never expressly pleaded by the appellant, it was not open for the appellant to raise the issue on appeal. This Court (in the words of Platt, JA.) in Wachira vs. Ndanjeru (1987), KLR 252 observed that:

> " .... the discretion to allow a point of law to be taken for the first time on appeal will not be exercised unless full justice can be done between the parties. It will not usually be allowed when to do so would involve disputed facts which were not investigated or tested at the trial. Nor will a party be allowed to raise on appeal, a case totally inconsistent with that which he raised in the trial court, even though evidence taken in that court supports the new case."

20. Accordingly, a party cannot be permitted to raise a new point of defence for the first time on appeal, and to urge the Court to allow his appeal based on the same point, when the trial court had no opportunity to consider it and pronounce itself thereon.

The same position applies to the issue regarding the alleged defect in the affidavit in support of the application.

21. The predecessor to this Court in Alwi Abdulrehman Saggaf vs. Abed Ali Algeredi [1961] EA 767 held that the course of taking a point of law, which has not been argued in the court below, on appeal ought not to be followed unless the court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated, would have supported the new plea. The justification for that holding was that:

> " The appellate jurisdiction is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the argument it is the invariable practice of the appellate tribunals to require that the judgements of the judges in the courts below shall be read. The efficiency and authority of a Court of Appeal, and especially a final Court of Appeal, are increased and strengthened by the opinions of the learned Judges who have considered these matters below. To acquiesce in such attempt as the appellants have made in this case is in effect to undertake decisions

which may be of the highest importance without having received any assistance at all from the judges in the courts below."

22. This Court in Stallion Insurance Company Limited vs. Ignazzio Messina & C S.P.A [2007] eKLR expressed itself on the question of raising issues for the first time on an appeal as follows:

> " It is common ground in this appeal that the issue intended to be raised did not form any ground stated in the memorandum of appeal and did not arise before the superior court. Indeed for a period of eight years it did not form part of the appellant's case. There are good reasons for the existence of the rule and some of them appear in the authorities cited before us by Mr. Karori. Apart from considerations of fairness, delay and prejudice that may be occasioned, the predecessor of this Court in the Alwi A. Saggaf Case (Supra) agreed with Lord Birkenhead L.C. in North Staffordshire Railways Co. v. Edge [1920] A.C. 254 at p. 263, on the guiding principle, when he stated:
>
> 'The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the arguments it is the invariable practice of appellate tribunals to require that the judgments of the judges in the courts below shall be read. The efficiency and the authority of a Court of Appeal, and especially of a final court of Appeal, are increased and strengthened by the opinions of learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case, is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below.'
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> The Privy Council also, in an appeal emanating from the supreme court of Kenya, The United Marketing Company Case (Supra), held: -
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> '(ii) their Lordships would not depart from their practice of refusing to allow a point not taken in the courts below to be argued unless they were satisfied that the evidence upon which they were asked to decide established beyond doubt that the facts, if fully investigated, would support the new plea; even if the facts were beyond dispute and no further investigation of facts were required, their Lordships would not readily allow a fresh point of law to be argued without the benefit of the judgments of the judges in the courts below, accordingly;
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> (iii) their Lordships would not, even if the question were a bare question of law, entertain the submission that the respondent's claim was to be defeated by reason of his breach of a condition in his contract of insurance. North Staffordshire Railway Company v. Edge, [1920] A.C. 254, applied.'
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> We are of the further view that the appellant's case as put and argued before the superior court was specific. The intention to alter it at this appellate stage would be grossly prejudicial to the respondent and it ought not to be allowed. The persuasive speech of Sir Raymond Evershed M.R. in United Dominion Trust Case (Supra) may illustrate the point: -
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> 'I rest my conclusion perhaps most strongly on this consideration, that the judgment, extracts from which I have read, seems to me to be in no way whatever related to it. Indeed, it seems to me to have proceeded on a basis which was absolutely inconsistent with the way in which counsel for the plaintiff now puts his case. As a matter of principle the Court of Appeal has always been strict in applying the rule that an appellant from a county court, unless the other party

> consents, cannot be allowed in this court to raise a new point of law not raised below. After all, the county court is intended to serve litigants of relatively small means. It is not in accordance with the public interest that a party who has fought a case in a county court and been defeated should then raise in this court a new point and put his case in an entirely different way as a matter of law and so make the other party, hitherto successful, litigate the matter again at the risk of having to pay the costs not only below, but in this court.'

The same approach appears to obtain in India where, in a case where the new issue of law was raised for the first time on appeal eighteen months after the lower court's decision, the court stated: -

> 'Unless upon very strong grounds, and under very special circumstances, we should hesitate to permit a party at such a stage of his suit, as the present suit now is, to set up a case which was not set up for him in the Court of first instance or of primary appeal, where his professional representative must have been perfectly well aware whether such a case as this alleged special custom could be legitimately set up, and abstained from any attempt to set it up. To yield to such an application as the present, would be to make an evil precedent, and to hold out a premium to perjury and interminable litigation.'

We have said enough, we think, to underscore our reluctance to accede to the arguments sought to be put forth by the appellant in this matter and we reject that attempt."

23. We are also mindful of this Court's observation in Kenya Hotels Limited vs. Oriental Commercial Bank Limited [2018] eKLR that:

> "Where the applicant seeks to introduce an entirely new point, there are well known strictures that seek to ensure firstly, that an appellate court does not, in disguise, metamorphose into a trial court and make first-instance determinations without the benefit of the input of the court from which the appeal arises...Due to these fundamental concerns, the Courts have developed fairly elaborate principles that guide it in determining whether or not to allow a new point on appeal. In Openda v. Ahn, (ca 42/1981) this Court identified some of the principles to include that all grounds of appeal must arise from issues that were sufficiently pleaded, canvassed, raised or succinctly made issues at the trial; that the point sought to be introduced must be consistent with the applicant's case as conducted in the trial court, not changing it into a totally different case; the matter must have been properly pleaded and the facts in support of the new point must have come out in the trial court."

24. Even if we were to consider the new issue raised before us, we are unable to determine from the record as put to us the nature of the said previous proceedings and how, if at all, they were determined. For the doctrine of res judicata to be successfully invoked, certain pre-requisites ought to be met. In Independent Electoral and Boundaries Commission vs. Maina Kiai and 5 Others [2017] eKLR it was held that:

> "...for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive but conjunctive terms;
>
> a. The suit or issue was directly and substantially in issue in the former suit.

b. The former suit was between the same parties or parties under whom they or any of them claim.

c. Those parties were litigating under the same title.

d. The issue was heard and finally determined in the former suit.

e. The court that formerly heard and determi ned the issue was competent to try the subsequent suit or the suit in which the issue is raised.

The learned Judges were fully aware and applied their minds to these elements when, applying this Court's decision in Uhuru Highway Development Ltd v Central Bank of Kenya [1999] eKLR they rendered the elements as;

a. the former judgment or order must be final;

b. the judgment or order must be on merits;

c. it must have been rendered by a court having jurisdiction over the subject matter and the parties; and

d. there must be between the first and the second action identity of parties, of subject matter and cause of action."

25. Since it was the appellant who raised the issue that the doctrine of res judicata was applicable, section 109 of the *Evidence Act* provides that:

> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

26. In the absence of any evidence in support of the appellant's contentions, that line of defence must fail.

27. As to whether the learned Judge failed to consider the evidence and/or arguments and/or submissions and/or authorities tendered by the appellant, we are of the view that the issues that fell for determination before the learned Judge were adequately dealt with. As held by the predecessor to this Court in Ramjibhai vs. Rattan Singh S/O Nagina Singh [1953] 1 EACA 71:

> "This Court will not disturb a finding of a trial Judge merely because of an irregularity in the format of the judgement if it thinks that the evidence on the record supports the decision."

28. This Court in Benjamin Mbugua Gitau vs. Republic [2011] eKLR cited the case of Odongo and another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR), where Odoki, JSC. (as he then was) had this to say:

> "While the length of the analysis [of a judgement] may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."

29. We have carefully considered the judgement of the learned Judge and are satisfied that it covered the substance of the issues placed before him. The only issues raised by the appellant were whether the suit was time barred; whether it was proper to grant the orders sought during the pendency of the appellant's appeal; and whether the eviction orders could issue while he was in occupation of the suit land. In our considered view, in light of the finding by the court that that the appellant had failed to

prove that he was in adverse possession of the respondent's suit land, the defence of limitation was no longer open to him. We also agree with the learned Judge that:

> " Order 42 Rule 6 of the Civil Procedure Rules is clear that no appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from unless there is an order of stay from the court."

30. Accordingly, we have no issue with the learned Judge's holding that:

> " ...the defendants' defence does not raise any triable issues and that this is an appropriate case for summary judgment and the eviction of the Defendant from the suit property."

31. In view of the foregoing, we find that summary judgement was properly entered against the appellant in the circumstances of the case.

32. Consequently, this appeal fails and is hereby dismissed with costs.

33. Those shall be our orders.

DATED AND DELIVERED AT NAIROBI THIS 12 TH DAY OF APRIL 2024.

A.K MURGOR, (P)

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JUDGE OF APPEAL

DR.K.I LAIBUTA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

SIGNED

DEPUTY REGISTRAR