Ogot v Keroka Highway Service Station (Civil Appeal E712 of 2023)
[2024] KECA 1499 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KECA 1499 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E712 OF 2023

DK MUSINGA, S OLE KANTAI & PM GACHOKA, JJA

OCTOBER 25, 2024

BETWEEN

MAURICE ODONGO OGOT ..... APPELLANT

AND

KEROKA HIGHWAY SERVICE STATION ..... RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court at Nairobi (E. K. Wabwoto, J.) delivered on 30th August, 2023 in E.L.C. CAUSE NO. 1356 OF 2014.)

JUDGMENT

1. This is a first appeal from the judgment of the Environment and Land Court – "ELC" (Wabwoto, J.) delivered on 30th August, 2023. Our duty as a first appellate court is to reevaluate the evidence, to retry the case as was held in the celebrated case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123 where the relevant principles were laid as follows:

> "...this Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial 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 witnesses and should make due allowance in this respect..."

2. It was averred in a plaint filed at the ELC by Keroka Highway Service Station Limited (the respondent) that it was the bonafide /rightful owner of the parcel of land known as LR No. NBI/BLK 97/0759/152 situate at Tassia Estate, Nairobi (the suit land), which land it had purchased from the National Social Security Fund (NSSF) after fulfilling all requirements and paying the requisite purchase price in full. It was averred by the respondent that the appellant (Maurice Odongo Ogot) "...who had been initially offered to purchase the property defaulted in payment of the required amount"; that despite several

demand notices from NSSF and other public notices which were made in the local daily newspapers the appellant did not fulfil the purchase requirements; that such failure prompted NSSF to repossess the suit land from the appellant; that after repossession of the suit land, the respondent was invited to purchase it, which it did. The respondent stated that the appellant had entered the suit land and remained on it without just or lawful cause; that the appellant's acts amounted to acts of trespass and infringement of its rights to a quiet use and enjoyment of its land and premises. For all that the respondent prayed for an order of eviction of the appellant from the suit land; a permanent injunction restraining the appellant from dealing with the suit land; general damages for trespass and costs of the suit.

3. Those averments were repeated in a witness statement by Abdirazak Hullow Ibrahim, the respondent's director, which was filed with the plaint with other support documents.

4. The appellant delivered a statement of defence where the respondent's claim was denied. It was taken as a defence at paragraphs 5, 6 and 7 of the statement of defence that:

> " 5. The Defendant purchased the suit premises in a Tenant Purchase Scheme from the National Social Security Fund hereinafter referred to as "The Fund" and has been regularly making payments to the Fund. Completion of payments will be in December 2019.
>
> 6. The Defendant denies ever defaulting in payment to the Fund and avers that in any case this cannot be the Plaintiff's business as it would be a matter between himself and the Fund if at all.
>
> 7. The Defendant states that in relation to land which is immovable the so called doctrine of repossession does not apply. The same applies in chattel mortgages and to hire purchase contracts. To this extent the Plaintiff's suit is scandalous, frivolous, vexatious, incompetent and an abuse of the court process."

5. The appellant averred in the defence that the respondent had admitted that it had either colluded with NSSF Managers in attempted land grabbing or was a victim of the fraud of its money by NSSF Managers, stating:

> " ... To this extent it is not possible for this Honourable Court to properly and conclusively adjudicate upon the matters herein when the National Social Security Fund is not a co-defendant. The suit is therefore incompetent and bad in law. The Defendant will crave the leave of this Court for the same to be struck out...."

6. The appellant took as a further defence that he could not be a trespasser on his own property and that the respondent's quest for injunctive remedies, eviction and damages was misplaced. He maintained that even under the doctrine of adverse possession he was legally the proprietor of the suit land. He prayed that the suit be dismissed.

7. In a reply to defence, the respondent denied what was stated in the statement of defence, reiterating the averments in the plaint.

8. Even with all the missiles fired by the appellant in the defence attacking the propriety of the suit the respondent did not find it necessary to take any action to bring NSSF to the suit and it will become clear later in this judgment why we have found it necessary to make this observation here.

The suit was originally heard to conclusion without participation by the appellant, but that is not of any moment because those proceedings were set aside and the suit was heard afresh before Wabwoto,

J. Abdirazak Hullow Ibrahim, the respondent's director who was the sole witness called in support of the respondent's case, adopted witness statement which he had filed with the plaint and which we have already referred to. It summarized the averments we have set out. He testified further that he had learnt of the offer of the suit land from the media; that he made a successful application and paid the purchase price Kshs.1,226,460. The respondent was then given a letter by NSSF to confirm that it was the owner of the suit land but when he visited the land he found that someone was in occupation of the same. This led NSSF to give a vacation notice to the appellant to leave the suit land but he did not. He testified in cross- examination:

And:

> "I had not seen the property before I paid for it, I did not investigate. I did not know the circumstances surrounding the plot. I did not know whether it was occupied.

I did not know who was in the property."

> "... I have seen some documents which I doubt that the Defendant paid for the land. It is N.S.S.F to verify whether or not the Defendant paid for the land. I cannot determine whether he paid or did not pay ... I do not represent N.S.S.F. Maurice is living on the land ... The house has been there since we bought the property..."

9. He further testified that he did not know for how long the appellant had occupied the suit property. Then the respondent's case was closed.

10. When the appellant was called to the witness stand to make his case in support of the statement of defence he adopted the witness statement filed with the defence where he had stated that he was the proprietor of the suit land which he had purchased from NSSF on 19th October, 2003 in a tenant purchase scheme. The purchase price was Kshs.800,000 which he had been paying in instalments and he was required to have completed the payment on or before December, 2019. He resided on the suit land with his family and was building another house which was almost complete. He stated that NSSF had no right to repossess the suit land; that in case of default all it could do was sue him for unpaid monies, which according to him would be premature as the last payment date was December, 2019. He wondered why NSSF had not been sued by the respondent yet it (NSSF) was a principal player in the matter. He stated that the respondent had been defrauded by managers of NSSF. He testified in cross –examination:

> "I was served on 24th November, 2014 with Court papers. By the time of service with court documents, I had not finished paying for the property..."

11. He stated that he had by then paid three quarters of the purchase price, and that upon being notified of the suit he protested to NSSF because the time for making payments was still running; that by the time he filed the statement of defence he had paid for the suit land in full. He had not sued NSSF as he had no case against it. He had paid the purchase price for the suit land in 3 batches- 13th September (year not stated); 8th October, 2014 and 9th December, 2014 and he had occupied the land for about 20 years by the time he was sued.

12. Daniel Bosire, called as a witness by the appellant adopted a witness statement made on 3rd June, 2021 where he stated that he was the Assistant Treasurer of Tassia East Self Help Group (the Group) where he was a member. That organization had a relationship with NSSF where in 2005 NSSF and the Group entered into an agreement to sell plots to members of the Group (by NSSF). It was the officials of the Group who managed the process and the appellant was allocated Plot No. 152 (which became the suit

land). According to him, NSSF allowed members of the Group to pay for plots in 120 months but that NSSF had in some cases arbitrarily altered the period for completion leading to various suits in courts; that there was an agreement where time for completion was extended by NSSF to 31st December 2014. In 2015 the Group chairman wrote a letter to NSSF stating that the appellant was the owner of the suit land but there was no response. Challenged in cross-examination to produce proof that NSSF had extended time for completion to members of the Group, he did not have such evidence but stated that the extension period had been published by NSSF in the media.

13. The appellant's case was then closed and the record shows that the Court ordered the plaintiff (respondent) to file and serve submissions within 21 days and upon service, the defendant (appellant) to equally had 21 days to file submissions. The case was adjourned to be mentioned on 28th July, 2022 to confirm filing of submissions and for allocation of a judgment date.

14. On 28th July, 2022 the Judge ordered further mention for 24th October, 2022 when it was ordered that judgment would be delivered on notice. Then the record gets rather interesting because the matter was before the Judge on 26th January, 2023 when the lawyer for the appellant's was present but the respondent's advocate was absent. The record shows at page 333 after recording the coram:

> " Courts Directions Issued.
>
> Hearing on 21st February, 2023 AT 2.30 P.M."

15. There is no indication in the record what these directions were and as will become clear, there was no application to the court by any party. It will be remembered that the case by both sides had been closed, dates for filing submissions given and it had been ordered that judgment was to be delivered on notice.

16. There is an unsigned document at page 134 of the record, "Summons to witness." It is addressed to The Trustee, National Social Security Fund, Legal Department which states:

> " Whereas your attendance is required to produce The register for L.r No
>
> 97/0759/152(Tassia Estate) on behalf of the Plaintiff in the above suit, you are hereby required (personally) to appear before this court on the ... 23rd ..... day of .... February .....2023 ..... at .... 9:00 O'clock in the .....FORE ... noon and to bring with you (or to send to this court) and so on from day to day until your presence is dispensed with.
>
> If you fail to comply with this order without lawful excuse, you will be subject to the consequences of non attendance laid down in Rule 12 of order XV of the Civil Procedure (Revised) Rules 1948.
>
> Given under my hands and the Seal of this Court this ..... day of 2023
>
> .....
>
> Registrar/Magistrate"

17. The document requires the Trustee of NSSF to attend court and produce the register for the suit land on behalf of the plaintiff (respondent) but there was no application by the respondent for NSSF to be summoned to court to produce such register.

18. It is recorded that on 21st February, 2023 with both lawyers present before the Judge, the lawyer for the respondent reported that he had served the Managing Trustee of NSSF with summons, that the

person assigned by NSSF to deal with the matter was engaged elsewhere and requested to attend Court on another date. The lawyer for the appellant said:

> " We seek clarification on what will be presented."

19. Summons to NSSF were extended to 1st March, 2023 at 2.30 p.m. on which day, in the presence of both lawyers, a witness appeared shown as:

> " Tobias Ombado Cross –Examined by Court."

20. Tobias Ombado stated that he was the Tenant Purchase Scheme Officer at NSSF. He had the file in respect of the suit property. The suit property, according to him, had been allocated to the appellant by the Group and he had paid Kshs.500,000. The appellant was to complete payment in 90 days but did not do so. The purchase price was changed by NSSF from Kshs.800,000 to Kshs.1,200,000 and there was a notice to defaulter, including the appellant. The suit land was then repossessed from the appellant and sold to the respondent in December, 2013.

21. Given an opportunity to cross-examine the witness, the appellant's lawyer began by saying:

> " Mr. Mugambi: I can ask a few questions. However, I consider the same to be an ambush."

22. Tobias Ombado did not have in the file the documents he had been asked to produce in cross-examination and he did not know whether the completion period for purchase of plots had been extended by NSSF. He did not have receipts to show what the appellant had paid to NSSF.

23. The parties were then given timelines to file further submissions and the matter was set for mention on 28th March, 2023 for purpose of giving a judgment date.

24. When the matter came up for mention on 28th March, 2023, counsel for the appellant complained that Tobias Ombado had gone away with his entire file and the lawyer was unable to file further submissions in the absence of documents in that file. The documents were finally returned, but the appellant's lawyer, in what appears to have been a parting shot declared:

> " We object to the process of how the documents were obtained. This would not present fair trial. There is no open transparency. Some documents may be sneaked in or forged."

25. Judgment was deferred to be delivered on 13th July, 2023 and when it was eventually delivered on 30th August, 2023 it was in favour of the respondent where an order of eviction of the appellant from the suit land within 90 days was ordered, a permanent injunction was issued against the appellant restraining him from in any way dealing or claiming the suit land, and each party was ordered to meet their costs.

26. We have travelled that long journey in analyzing the record because we are disturbed by the way the hearing was handled by the trial Judge.

27. There are 16 grounds of appeal set out in the Memorandum of Appeal drawn for the appellant by his lawyers, M/S Mugambi Mungania & Co. Advocates. These can be summarized as follows: the Judge erred in law and fact in finding for the respondent; that the Judge erred in failing to appreciate that the dispute was not suitable for invoking sections 22(b) and 23 *Civil Procedure Act*; at grounds 4 and 5:

> " 4. The Learned Judge erred in invoking Sections 22(b) and 23 of the *Civil Procedure Act*, Cap 21 Laws of Kenya at the stage, point and in a procedure

where the respondent was not in a position to join (The Managing Trustee(s) of the National Social Security Fund) N.S.S.F as a party or take legal measures capable of bringing additional pleadings and evidence.

5. The Learned Judge erred in adopting a procedure that did not offer any or adequate opportunity for the ascertainment of the authenticity, credibility and completeness of the evidence purportedly tendered by and from N.S.S.F."

28. That the witness called by the court to testify for NSSF was not a suitable witness and was biased and hostile against the appellant; that NSSF not being a party to the suit did not accord the appellant a fair hearing in the matter; that the Judge should have found that the appellant had met his contractual obligations to NSSF after making the final payment on 9th December, 2014; at grounds, 12, 13 and 14:

" 12. The Learned Judge erred in law by directing the parties to obtain evidentiary material from N.S.S.F - instead of production in the open court by N.S.S.F – and applying a procedure that is unknown in law or justifiable in the circumstances, was prone to abuse and indeed was abused to the detriment of the appellant.

13. The procedure adopted by the Learned Judge enabled the evasion of liability on the part of N.S.S.F and the manipulation/distortion of, selective provision of biased evidence and concealment of relevant/crucial evidence favourable to the appellant.

13. The trial was unfair and led to miscarriage of justice."

29. The appellant states in other grounds of appeal that the Judge should have found that the respondent had no locus standi in the suit land and, finally, that the Judge erred by taking into account extraneous matters into consideration.

30. When the appeal came up for hearing before us on 21st May, 2024, the appellant was represented by learned counsel Mr. Mugambi while learned counsel Mr. Kang'ethe appeared for the respondent. Both sides had filed written submissions and in a highlight counsel for the appellant submitted that the respondent could not rely on a contract between the appellant and NSSF where it (the respondent) was not a party. Counsel submitted that if there was a breach in the contract between the appellant and NSSF, it was not for the respondent to take issue with such breach. On the issue of repossession of the suit land by NSSF, counsel submitted that NSSF would have had to obtain a court order to do so which it did not. Counsel concluded his submissions by stating that the Judge erred in summoning NSSF when the parties had chosen to proceed in a certain way.

31. Counsel for the respondent submitted that the appellant had failed to pay for the suit land, leading to its repossession by NSSF; that the respondent had been given ownership documents for the suit land by NSSF thus obtaining locus standi to sue. Counsel defended the Judge who exercised discretion to summon NSSF to testify in the suit in exercise of powers donated by sections 22 and 23 *Civil Procedure Act*.

32. In a rejoinder counsel for the appellant submitted that the appellant had made full payment for the suit land in 2014 when he had up to 2019 to make full payment for the suit land.

33. We have considered the whole record, submissions made and the law, and this is how we determine the appeal.

34. The case for the respondent was always that it had purchased the suit land from NSSF after the appellant, who had been allocated the land had defaulted in payment and that the land had been repossessed by NSSF and allocated to it (the respondent).

35. The appellant's case was that he had been allocated the suit land by NSSF and was required to pay the purchase price by instalments; that he had paid all the instalments as required within the time agreed between him and NSSF. He produced bank deposits to show the following payments as per his testimony and his letter dated 29th October, 2018 to NSSF at page 248 of the record of appeal – 19th September, 2013 Kshs.50,000, 8th October, 2014 Kshs.12,000 and 9th December, 2014 Kshs.1,118,460 total Kshs.1,180,460.

36. The respondent did not state in the plaint when it was allocated the land. It stated in testimony before the Judge that it paid the purchase price of Kshs.1,226,460 and was issued with a receipt for that payment on 18th December, 2013.

37. NSSF was not a party to the suit to testify why it would allocate the suit land to the respondent, which land it had allocated to the appellant. NSSF had not sued the appellant to enable it to repossess the suit land. It could not repossess the land without such order and that was the position the appellant took in his statement of defence. This Court held in Gusii Mwalimu Investment Co. Limited & 2 Others vs. Mwalimu Hotel Kisii Limited [1996] eKLR:

> "If what the landlord did in this case is allowed to happen we will reach a situation when the landlord will simply walk into the demised premises exercising his right of re-entry and obtaining possession extra-judicially. A court of law cannot allow such state of affairs whereby the law of the jungle takes over. It is trite law that unless the tenant consents or agrees to give up possession the landlord has to obtain an order of a competent court or a statutory tribunal (as appropriate) to obtain an order for possession."

39. On the basis that NSSF could not purport to repossess the suit land which it had allocated to the appellant and where it had not followed any lawful process to repossess the land and where the respondent could not, as it admitted, speak for NSSF in the suit it had filed against the appellant, the respondent's suit should have failed.

30. But there is the more interesting aspect of the appeal where the appellant faults the Judge for the way he exercised his discretion under sections 22 and 23 *Civil Procedure Act* and section 173 *Evidence Act*.

40. As we have seen, the respondent called its director and then closed its case, after which the appellant testified, called one witness and also closed his case. The parties were then ordered to file written submissions, but while this was going on, it appears that the Judge, without any prompting by any party and without any application made before him, decided suo moto to summon a Trustee of NSSF to attend court and produce the file relating to the suit land. Summons issued curiously indicated that the Trustee was to testify:

> "...on behalf of the Plaintiff in the above suit..."

41. We say curiously because the respondent (who was the plaintiff) had not made any application in that regard. When Tobias Ombado appeared he did not produce any authority from the Trustees, NSSF,

authorizing him to testify for NSSF, and it is shown that he was cross-examined by the court. This is how the Judge expresses himself at paragraph 60 of the judgment in this regard:

> "60. During the hearing of the suit, none of the parties called any witness from NSSF to clarify as to who is the legitimate owner of the suit property. This prompted the court under Sections 22 (b) and 23 of the Civil Procedure Act to issue summons to the Managing Trustee NSSF or any other person instructed by him to attend and give evidence or to produce documents in respect to the NSSF position on the matter. This court was also guided by Section 173 of the *Evidence Act* which empowers a Judge or a Magistrate in order to obtain proper evidence to ask any question in any form at any time of any witness or to the parties about any fact and to order the production of any document or thing. This discretion must be exercised only in exceptional circumstances and with great caution and this court considered this as an exceptional case that justifies the exercise of the said court's discretion in order to do justice between the parties and determine the dispute with finality."

42. It is true that sections 22(b) and 23 of the *Civil Procedure Act* and section 173 of the *Evidence Act* give power to a Judge or magistrate to ask questions of witnesses, summon a witness or call for additional evidence. Section 22 of the said Act is on "Power to order discovery and the like" while section 23 is on "Summons to witness." The heading to section 173 of the *Evidence Act* is "Extended powers of court for purpose of obtaining proper evidence."

43. Those provisions of the law allow the trial court to seek evidence that will enable it to make a more informed judgment but this does not take away the fundamental principle that the Judge or magistrate is and must remain an impartial arbiter in the proceedings, more so in civil proceedings which involve resolution of disputes between parties. The court cannot go into a fishing expedition looking for evidence, the court should not be seen to be assisting either side in the dispute. Disputes in civil proceedings should be determined based on the pleadings and evidence. As was observed by Sir Barclay Nihil, P in Jashbhai C Patel vs. BD Joshi [1952], 19 EACA 42:

> "A trial judge should not descend into the arena where his vision may become clouded by the dust of the conflict... Where the parties are represented by counsel, it is preferable that ordinarily the conduct of the case should remain in their hands. Not to do so might indeed lead to error of descending into the arena."

44. The trial court must be cautious of how it exercises the said powers under the *Civil Procedure Act* and *Evidence Act* so that the exercise does not negatively affect the perception of a fair trial. This Court in Accredo AG & 3 others vs. Steffano Ucceli & Another [2018] eKLR had this to say on fair trial:

> "The right to have a dispute adjudicated before an impartial court is a subset of the right to a fair hearing as enshrined under Article 150 of the Constitution. Together they advance the rule of law in that, on one hand, litigants are afforded an opportunity to present their respective cases and on the other, the court seized of the matter resolves the issues that arise therein as an impartial arbiter and within the confines of the law."

45. The Court in the said Accredo (supra) case said this of section 77 of the retired Constitution which today is the equivalent of Article 50 of the *Constitution of Kenya, 2010*:

Section 77 (9) of the retired constitution provided as follows:

> "A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be

independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."

46. In the instant case, both sides had closed their respective cases and were waiting for judgment when the court, on its own motion, decided to summon the Managing Trustee, NSSF, who, according to the witness summons, was to testify as witness for the plaintiff (respondent). The parties were not informed why the Judge had decided to do so, and even the protest by counsel for the appellant that he was being ambushed was not given any weight by the Judge at all. The witness who then appeared was allowed to take away some vital documents from the file and the complaint by counsel for the appellant that documents could have been sneaked into the file or be forged was ignored. We think that this was not a proper course for the Judge to take. There were no exceptional reasons or circumstances calling for the Judge to do that.

47. The appellant had taken as his defence the position that it was not possible for the court to adjudicate on the matter where NSSF had not been made a party to the suit. The respondent was thus warned from the very beginning that its suit was incompetent in the absence of joinder of NSSF but it did not heed that warning at all. We think, in those circumstances, that it was wrong for the Judge, at judgment stage, to invoke the provisions of section 22 and 23 of the *Civil Procedure Act* and section 173 of the *Evidence Act* to summon NSSF, which the respondent had failed to add as a necessary party to the suit without assigning any reason for such non-joinder. The court's action bordered on appearing to make a case for the respondent, something a court should not do; the court should have decided the case on the basis of the case made by the respondent and the defence offered by the appellant. We are not satisfied that by the time the respondent closed its case it had demonstrated that it was entitled to judgment on a balance of probabilities. The appellant had stated in his statement of defence, inter alia, that the respondent had colluded with NSSF managers to defraud him of the suit land. Neither of the parties had title to the land. The appellant had been in possession of the suit land for many years. The respondent admitted that it purchased the suit land without having ever seen it; it did not do any due diligence before purchasing the land. The Judge relied heavily on the evidence of Tobias Ombado, whose evidence was shaky; the file he relied on lacked vital documents like receipts showing payments by the appellant for purchase of the suit land. The witness was allowed to take away the file after giving evidence and there is credence to the complaint by counsel for the appellant that the documents could have been interfered with or be forged. This finding determines the appeal and we need not consider the other grounds of appeal raised by the appellant.

48. We allow the appeal and set aside the trial court's judgment, with the effect that the suit by the respondent at the ELC be and is hereby dismissed. The appellant will have costs of the appeal and of the proceedings in the court below.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER, 2024.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

M. GACHOKA, C.Arb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR