Aroni v Likoni Mainland Taxi Service Group & 3 others (Civil Appeal E036 of 2022) [2024] KECA 1566 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KECA 1566 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E036 OF 2022

AK MURGOR, S OLE KANTAI & GV ODUNGA, JJA

NOVEMBER 8, 2024

BETWEEN

JOSHUA MAKIYA ARONI ..... APPELLANT

AND

LIKONI MAINLAND TAXI SERVICE GROUP ..... 1ST RESPONDENT

KHAMISI M NGUMI GUGU ..... 2ND RESPONDENT

HASSAN SWALEHE M NGUMI ..... 3RD RESPONDENT

AMANI MOHAMED ..... 4TH RESPONDENT

(Being an appeal against the Judgment and Decree of the Environment and Land Court at Mombasa (N. A. Matheka, J.) delivered on 22nd March, 2022 in E.L.C. Case No. 30 of 2021.)

JUDGMENT

1. This is a second appeal from the original findings by the Magistrate's Court at Mombasa where the appellant's suit was found to have no merit. His first appeal to the Environment and Land Court in Mombasa was dismissed by Matheka, J. in a judgment delivered on 22nd March, 2022. Our jurisdiction in such an appeal is limited by section 72 *Civil Procedure Act* to instances where the decision of the High Court is contrary to law or some usage having the force of law; the decision having failed to determine some material issue of law or usage having the force of law or where a substantial error or defect in the procedure provided by *Civil Procedure Act* or any other law for the time being in force which may have probably produced error or defect in the decision of the case upon the merits. That jurisdiction has been considered by this Court in various decisions such as *Charles Kipkoech Leting v Express (K) Limited & Another* [2018] eKLR where we stated:

> "This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See *Maina v Mugiria* [1983] KLR 78, *Kenya Breweries Ltd v Godfrey*

Odongo, Civil Appeal No. 127 of 2007, and *Stanley N. Muriithi & Another v Bernard Munene Ithiga* [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the *English case of Martin v Glywed Distributors Ltd* (t/a MBS Fastenings) 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

2. We visit the facts briefly to see and determine whether the two courts below carried out their mandate as required in law.

3. The appellant Joshua Makiya Aroni t/a The Office Restaurant sued the respondents Likoni Mainland Taxi Service Group, Khamisi M. Ngumi Gugu, Hassan Swalehe M. Ngumi and Amani Mohamed (official) claiming that the respondents had approached him on or about 2nd December, 2006 to allow them to erect a temporary structure on the frontage to his building, a request which he granted but that in 2009 the respondents invited other people leading him to warn them of that action; that the respondents had then approached Municipal Council of Mombasa to be allowed temporary occupation; that the respondents had erected a permanent structure leading him to file the suit. He therefore prayed for an injunction to restrain the respondents from further encroaching on his property; that the respondents be ordered to remove structures from the frontage and the respondents be evicted. Those averments were repeated in a witness statement which he filed with the plaint and also the witness statement of his wife Penina Chepkemoi Aroni. Their property was identified as Likoni Plot No. Mombasa/Block 1/1680 (hereinafter the "suit land.")

4. The claim was resisted through the respondents defence which while denying the claim took as a defence at paragraph 5 thereof:-

> 5. Further to paragraph 4 hereinabove, the Defendants aver that indeed they have not encroached the plaintiff's suit but on a road reserve adjacent to the suit property."

5. In testimony before the magistrate the appellant reiterated his averments in plaint and witness statement that he was the owner of the suit land whose frontage had been obstructed by the respondents. He admitted that the frontage to his restaurant faced a road reserve which the respondents were occupying but he claimed that he also wanted to utilize the road reserve by expanding his business.

6. The 5th respondent testified that he was a taxi driver and a member of the 1st respondent whose office neighboured the suit land. According to him the office was on a road reserve and had not encroached the appellant's land; that the appellant had encroached on the road reserve by building 25-30 kiosks which he let out to tenants. The 1st respondent paid parking fees to the County government.

7. The other respondents were called and gave similar testimony and there was also the testimony of Teddy Muturi, a licenced surveyor, who had carried out a survey of the area on 2nd March, 2016. He found that the respondents operated on the road reserve and had not encroached the suit land.

8. The magistrate analysed the case made by both sides and came to the conclusion that the disputed part of the land was on a road reserve as defined in the *Public Roads and Roads of Access Act* and was thus public land reserved for use by the public. He found that the appellant's premises (suit land) had not

been encroached by the respondents and there was no obstruction of the appellant's premises at all. The suit was dismissed, findings that were upheld on first appeal.

9. There are 11 grounds of appeal set out in Memorandum of Appeal drawn by counsel for the appellant M/s Mburu Nyambonye & Company Advocates. The appellant faults the Judge (on first appeal) for ignoring paragraphs 5, 6 and 7 of Memorandum of Appeal filed at ELC where the appellant had faulted the trial magistrate for holding that he had colluded with officers of the County Government to revoke a temporary licence issued to the respondents; that the magistrate had erred in finding that the respondents had a right to occupy road reserve; that the magistrate had erred in failing to note that the respondents parking of taxis was not a designated or gazetted parking area. The Judge is faulted for finding that the respondents had a right to park at the road reserve; for relying on the evidence by the surveyor; for finding that taxis operations were on a road reserve which belongs to the government "... and that the appellant has no proprietary rights over road reserve despite the parking lot causing obstruction to the appellant access and lack of breathing space." The Judge is faulted for giving rights of user of the road reserve to the respondents and denying the appellant similar rights; that the Judge ignored submissions made by the appellant. We are asked to allow the appeal set aside judgment in the first appeal; that we set aside the said judgment and substitute it with an order allowing the prayers in the plaint.

10. When the appeal came up before us for hearing on 19th June, 2024 the appellant was represented by learned counsel Mr. Arunga while the respondents were represented by learned counsel Mr. Tindika. Both sides had filed written submissions and in a highlight, counsel for the appellant submitted that the appellant was not claiming proprietary rights but his case was that the respondents had encroached the frontage of his premises. Counsel cited provisions of the *Traffic Act* which prohibits encroaching road reserves submitting that the respondents had not tendered evidence that they had permission from the authority in charge of roads to park taxis on road reserve.

11. Counsel for the respondents submitted that the appellant had not raised any issue of law calling for our determination in a second appeal. According to counsel issues relating to breach of *Traffic Act* had never been raised before and it was wrong for the appellant to raise it in this appeal.

12. We have considered the whole record, submissions made and the law.

13. It will be remembered that it was the appellant's case as set out in the plaint that he was the owner of the suit land and that there was encroachment by the respondents of the land. He asked that a permanent injunction be issued in his favour against the respondents and that they be evicted from the space they occupied.

14. There are concurrent findings by the two courts that there was no encroachment on the suit land at all. The appellant did not show that he had authority of the County Government or the authority in charge of managing or maintaining roads to complain on their behalf if, indeed, the respondents had encroached onto the road reserve. We agree with counsel for the respondents that the appellant is not on a mission to protect the road reserve but is motivated by a desire to, himself, encroach the road reserve. If, indeed, there is encroachment on the road reserve the relevant authorities will do the needful as is required by their mandate. The appellant is not a public – spirited individual out to protect any public asset at all. The suit was incompetent from the beginning and it suffered the proper fate by being dismissed.

15. We have not found any points of law meriting our consideration in this second appeal. This appeal has no merit and it is dismissed with costs to the respondents.

DATED AND DELIVERED MOMBASA THIS 8TH DAY OF NOVEMBER, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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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