



**Mweni & 12 others v Nywele & another (Civil Appeal 54 of 2020)
[2023] KECA 67 (KLR) (3 February 2023) (Judgment)**

Neutral citation: [2023] KECA 67 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 54 OF 2020
SG KAIRU, JW LESSIT & GV ODUNGA, JJA
FEBRUARY 3, 2023**

BETWEEN

PIUS KAZUNGU MWENI & 12 OTHERS APPELLANT

AND

JEFWA NYALE 1ST RESPONDENT

ABDULRAHMAN ABDALLA SALIM 2ND RESPONDENT

(Being an appeal from the Ruling of the Environment and Land Court of Kenya at Mombasa (Hon. S. Munyao, J.) dated 7th May, 2020 in ELC Civil Case No. 228 of 2014)

JUDGMENT

1. On September 1, 2014, the appellants, as plaintiffs, through the firm of Ambwere T S and Associates, filed an originating summons against Jefwa Nyale, the 1st respondent and Abdulrahman Abdalla Salim, the 2nd respondent, before the Environment and Land Court (ELC). In the Summons, the Appellants sought a declaration that they were the beneficiaries, by virtue of adverse possession, of and were entitled to be registered as owners of Land Parcel No. 255/11/MN (with various sub-plots) 6198, 6204, 6200, 6199, 6191, 6181, 6187, 6201 and 6188 (Original 255/34) Section 11 Mainland North Mombasa. Accordingly, they sought orders restraining the Respondents from evicting, demolishing and/or interfering with their quiet enjoyment of the said parcels of land.
2. On January 29, 2015, a memorandum of appearance dated December 19, 2014, was filed on behalf of Jefwa Nyale, the 1st respondent herein, through the firm of M/s Kamoti Omollo & Company Advocates. However, Jefwa Nyale was indicated both in the title of the memorandum and in the body thereof as the 2nd Defendant. This mistake was compounded by the 2nd respondent when on February 11, 2015, a Notice of Appointment of Advocate was filed by the firm of A.O. Hamza & Company Advocates, purportedly on behalf of the 1st respondent, yet the same firm of Advocates on February 23, 2015, filed a replying affidavit sworn by Abdulrahman Abdalla Salim, the 2nd respondent herein.



3. In that affidavit, the 2nd respondent disputed the appellants claim that they were entitled to the said parcels of lands and averred that the appellants were mere tenants who occupied the said parcels of land with the permission and authority of the then landlord to whom they paid rent.
4. By a consent dated May 8, 2018, signed between Ambwere T. S. Associates, who were indicated as acting for the Appellants and Kamoti Omollo & Company Advocates, indicated therein as acting for the 2nd Respondent, it was agreed that each of the Appellants would purchase their respective plots from the 1st Respondent for Kshs 450,000/- per plot save for the subdivision number 6198 (original number 255/34) section 11 Mainland North which had already been sold to the 2nd respondent. The said payment was to be made by 5 annual instalments of Kshs 90,000/00 commencing from October 1, 2018 and on the 1st October of each succeeding year till payment in full. Upon payment of the first instalment, the 1st Respondent's Advocates were to prepare for execution by the respective Appellants and the 1st Respondent, agreements for sale for each of the Appellants in terms of the consent. Each party was to bear own costs but the Appellants were to bear the respective costs of the conveyance as well as the 2nd Respondent's costs thereof. In default of payments as stipulated the 2nd Respondent would be at liberty to sell the respective Appellants' portion or subdivision without reference to them and the said Appellants would be evicted therefrom. Once against the consent indicated that Ambere T. S. Associates were acting for the Appellants while Kamoti Omollo & Company Advocates were acting for the 2nd Respondent.
5. When on 6th November, 2018, the matter was before the Court, only Mr Hamza, learned counsel for the 2nd Respondent was present and he supported the dismissal of the suit. Accordingly, the suit was dismissed for want of prosecution under order 12(2)(1) of the *Civil Procedure Rules* and costs were awarded to Abdulrahman Abdalla Salim, the 2nd respondent.
6. By a notice of motion dated February 10, 2020 filed the same day, on behalf of the Appellants, it was sought, in substance, that the dismissal or action stopping the suit from being finalized as per the consent dated May 8, 2018, be set aside. The said application was based on the allegation that there were negotiations between the Appellants and the Respondents culminating into the said consent which was signed between the parties which however did not provide for costs and that the parties were still in the process of complying with the said consent. It was contended that the dismissal, if any, was without notice and was in ignorance of the signed and filed consent whose effect was to settle the matter. It was therefore contended that the dismissal was illegal and inconsequential.
7. In response to the said application, the 2nd respondent, Abdulrahman Abdalla Salim, by his affidavit sworn on February 17, 2020, averred that he was represented by the firm of A. O Hamza & Company Advocates while the 1st Respondent was represented by the firm of Kamoti Omollo & Company Advocates and that he was not a party to the said consent. According to him the consent did not settle the whole suit which was against the two Respondents jointly. He deposed that the suit was dismissed due to the inaction on the part of the Appellants and that despite knowledge of the dismissal no application was made to reinstate the same. According to him the order of dismissal awarded him the costs of the suit which had not been appealed against.
8. After hearing the application, the trial court on 7th May, 2020 dismissed the application. In so doing the Learned Judge found that in the proceedings in question the 2nd Respondent, Abdulrahman Abdalla Salim was represented by M/s Hamza & Company Advocates while the 1st Respondent could only have been represented by M/s Kamoti Omollo & Company Advocates. He also found that the consent, though filed, was never endorsed by the court. As a result, the Court, on own motion listed the mater for dismissal with notice to the parties after which no action was taken in the matter until the bill of



costs was filed. According to the Learned Judge, the mere filing of the consent did not mean that the same had been adopted as the order of the court and the suit continued in existence and was liable to be dismissed. It was also noted that no explanation was offered why there was no appearance on the day of the Notice to Show Cause. In any case, it was noted, the consent could only bind the 1st Respondent and not the 2nd Respondent who was not a party to it hence nothing prevented the dismissal of the suit as against the 2nd Respondent.

9. It was that decision that aggrieved the Appellant herein and is the genesis of the appeal before us.
10. When this appeal was virtually called out for hearing on 11th October, 2022, Learned Counsel Mr Ambwere appeared for the Appellants, Mr Omollo appeared for the 1st Respondent while Mr Hamza appeared for the 2nd Respondent. While Mr Omollo informed the Court that he was not opposing appeal, the appeal was opposed by Mr Hamza. According to Mr Omollo, the Appellant and the 1st Respondent had substantially settled the matter and only a small portion remained to be settled.
11. The appeal was argued by way of written submissions which were highlighted by counsel for the respective parties. The grounds of appeal were combined under 4 headings: the validity of the consent in settling the suit; the elevation of procedural technicality over substantive justice; the service of the notice of dismissal; and the issue of representation.
12. As regards the first head, it was submitted that though a good practice, the failure to endorse a consent is not fatal if not done in time since the parties are at liberty to compromise their case whichever way they want as long as it is not against public policy. To the appellant the dismissal of a suit where a consent has been filed is irregular and does not serve the interests of the parties or litigants, yet the court's duty is to do justice. It was submitted that since the owner of the land had agreed to sell the parcel of land to the Appellants, his wishes could not be wished away by technicalities of dismissal.
13. On the second head of grounds, it was submitted that the action of dismissal of the suit was an error in that technicality was elevated over substantive justice without an inquiry being made as to whether the notice of dismissal was served on the parties.
14. The third head of grounds was to the effect that the dismissal of the suit during service week based on notification via notice board was most unfortunate and amounted to injustice against advocate and litigants hence dismissal was irregular and prejudicial to the parties.
15. On representation, it was submitted that all parties were properly on record and were properly represented. It was argued that the court ought to have sought clarity as to which party was represented by which counsel. It was submitted that the firm of Kamoti Omollo & Company Advocates inadvertently entered appearance for the 2nd Respondent while A. O. Hamza & Company Advocates filed a Notice of Appointment for the 1st Respondent. In effect the two advocates interchanged their respective clients due to typing error that ought to have been clarified by the Court instead of dismissing the same.
16. In his oral address to the Court, Mr Ambwere reiterated the substance of the written submissions and added that the court ought to have summoned the parties to record the consent instead of dismissing the suit and that had they being afforded an opportunity of being heard the court would have arrived at a different conclusion. According to learned counsel, the act of dismissing cases to clear backlog is unjust to the litigants particularly when notices are serve by being placed on the notice board particularly during Covid 19 pandemic.
17. On behalf of the 2nd respondent, it was submitted on the issue of representation that there was an oversight on the part of the 2nd Respondent's Advocates and an error on the face of the record as clearly



- the 2nd Respondent's Advocates mistitled the heading of the primary suit and entered appearance in line with the said heading. It was however submitted that the error was not fatal but was a procedural technicality curable by article 159(2)(d) of *the Constitution* of Kenya, 2010 and the oxygen principles as enshrined in the *Civil Procedure Act*. As to whether the 1st Respondent was properly represented by the firm of Kamoti Omollo & Company Advocates, the 2nd respondent left the matter in the hands of the court since he was never served with any pleadings by the 1st respondent and/or his representative. The court was urged to rely on the record.
18. Regarding the consent entered between the appellants and the 1st respondent in the primary suit, it was submitted that regardless of the intention, the appellants and the 1st respondent have no authority and/or locus to enter into negotiations on his behalf. Additionally, it was only when the 2nd respondent was served with the appellants' application dated February 10, 2020 that he came to know of the existence of the alleged consent. It was submitted that no Court or person can issue orders adversely affecting persons or bodies that are not party in an agreement or consent. As far as the 2nd respondent was concerned, the alleged consent was between the appellants and the 1st respondent thus only covered plots owned by the 1st respondent and not the 2nd respondent's Plot No. 6198. Consequently, as the said consent did not settle the entire suit, the dismissal of the suit against the 2nd respondent stands.
 19. The 2nd respondent also associated himself with the holding of the Learned Trial Judge with regard to an un-verified and un-adopted consent being not binding as orders of the court as provided by rule 35 of the Practice Directions on Proceedings in the Environment and Land Court, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts, Gazette Notice No. 5178 of 25th July, 2014 with respect to the need to have the consents approved and adopted by the Court. Based on the holding in *Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 others* [20131 eKLR and *Mumo Matemo vs. Trusted Society of Human Rights Alliance & 5 Others* Civil Appeal No. 290 of 2012, it was submitted that article 159 of *the Constitution* cannot be called in aid of the appellants.
 20. In the 2nd respondent's view, it is also ironic for the appellants to allege that they were not served with the Dismissal Notice and yet again admit that though it was normal for dismissal notices to be served by affixing them on the Court's Notice Board they would prefer personal service to be effected on them as they were not regular Court attenders. It was submitted that it was permissible to publish the said Notices on the Court's Notice Board as well as on the Mombasa Law Society WhatsApp groups. Furthermore, it was submitted, the said Notice of Dismissal was issued on October 12, 2018 while the hearing was scheduled on November 6, 2018 thus if the Appellants were vigilant in prosecuting their suit they would have long found out about the said Notice. Likewise, the Appellants and/or their Advocates failed to attend the Trial Court on the said hearing date thus prompting for their suit to be dismissed for want of prosecution with costs to the 2nd Respondent.
 21. It was noted that even after the said dismissal, the Appellants did not take any action to reinstate their said suit and waited till February 10, 2020, almost 2 years later and way after being served with the 2nd Respondent's Bill of Costs filed on November 28, 2019, to apply to set aside the said Orders of dismissal without any tangible explanation of the inordinate delay. Based on the said submissions, the Court was urged to dismiss the appeal. It was further noted that when the suit was dismissed by the Trial Court, the 2nd Respondent was granted costs and the same have not been appealed against.
 22. Mr Hamza, in his oral address, substantially reiterated the substance of the written submissions.



Analysis And Determination

23. We have considered the written and oral submissions by counsel and the authorities cited.
24. Being a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions. In *Selle -vs- Associated Motor Boat Co.* [1968] EA 123, it was expressed that:

“An appeal to this Court from a trial by the High 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. 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 demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif - v - Ali Mohamed Sholan* (1955), 22 E. A. C. A. 270).”
25. We have set out at the onset of this judgement the sequence of appearances by the parties herein particularly the Respondents whose representation is in issue. As stated, the firm of M/s Kamoti Omollo & Company Advocates, entered appearance on behalf of Jefwa Nyale, who was named in the Originating Summons as the 1st Defendant. Accordingly, the subsequent Notice of Appointment filed by the firm of A. O. Hamza & Company Advocates, purportedly on behalf of the 1st Respondent could only have been filed on behalf of the 2nd Respondent and the indication that the said firm was acting for the 1st Respondent could only have been an inadvertence. This is clear from the fact that the title of the said document indicated Abdulrahman Abdalla Salim, the 2nd Respondent herein, as the 1st Defendant. The matter was clearly clarified when same firm of Advocates on February 23, 2015, filed a replying affidavit sworn by Abdulrahman Abdalla Salim, the 2nd Respondent herein. Even before us it was clear that Mr Omollo was appearing for the 1st Respondent while Mr Hamza appeared for the 2nd Respondent
26. We therefore have no doubt in our mind that the firm of Kamoti & Omollo Advocates was retained by the 1st Respondent herein, Jefwa Nyale, while the firm of A. O. Hamza & Company Advocates was retained by the 2nd Respondent herein, Abdulrahman Abdalla Salim. Nothing therefore turns on the issue of representation as long as it is clear which firm was acting for which party in the proceedings.
27. The next issue is whether there was a consent file by the parties herein and its effect on the dismissal of the suit. There is no doubt that the said consent though filed was never endorsed as an order of the Court. It is also not in doubt that under Rule 35 of the Practice Directions on Proceedings in the Environment and Land Court, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts, Gazette Notice No. 5178 of July 25, 2014, to be effective consents filed before the Environment and Land Court have to be approved and adopted by the Court. The rationale for this requirement is not difficult to understand and in our view it is meant to obviate situations where unscrupulous parties purport to record consents touching on land affecting interests of third parties. It is therefore important that the Court approves such consents before they become enforceable.
28. In this case we have no hesitation in finding that the consent letter filed before this Court did not acquire the force of a court order as it was never adopted and endorsed by the Court.



29. The second reason why the said letter could not be a court order is that it was only signed on behalf of the Appellant and the 1st Respondent. Even if the letter had been adopted, it could not bind the 2nd Respondent who was not party to it and could not be deemed to have fully settled the dispute between all the parties. We hold that a consent order, particularly where the proceedings in question are in personam as opposed to proceedings in rem, can only bind the parties to that consent. See *Earnest Orwa Mwai vs. Abdul S. Hashid & another* [1995] eKLR.
30. Accordingly, the consent signed between the Appellant and the 1st Respondent, even if it had been recorded would not have settled the whole suit since the suit against the 2nd Respondent would still have remained unresolved. That suit, in our view, was capable of being dismissed for want of prosecution as long as it remained unprosecuted.
31. The next issue is whether the Appellants were notified of the Court's intention to dismiss the suit for want of prosecution. In the affidavit sworn in support of the application for setting aside the dismissal, the deponent averred that he was never served with the notice of the intention to dismiss the suit. The response by the respondent was that despite the plaintiff's knowledge of the dismissal the plaintiff did not reinstate the suit. Our perusal of the record does not reveal how the notice of dismissal was served though from the submissions of the parties filed before us it would seem that the notification was via judicial notice board.
32. There is no indication on the record that on the date of the dismissal of the case, the Learned Trial Judge satisfied herself that all the parties were served before dismissing the suit. In the ruling appealed from, the Learned Trial Judge did not address his mind to the important issue of service of the notice to show cause. In the absence of any evidence of proper service on the appellant's Advocates, we are constrained to agree with the appellants that they were not notified of the intention to dismiss the suit.
33. In the premises we find merit in this appeal which we hereby allow, set aside the order made on May 7, 2020 dismissing the application dated February 10, 2020 and substitute therefor the order allowing the application. We direct that Mombasa ELC Civil Case No. 228 of 2014 be reinstated to hearing.
34. As the dismissal was at the instance of the Court we make no order as to the costs of this appeal.
35. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 3RD DAY OF FEBRUARY, 2023.

S. GATEMBU KAIRU (FCI Arb.)

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JUDGE OF APPEAL

J. LESIIT

.....

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.

