Muya & another v Hassan & 2 others (Civil Appeal 205 of 2019) [2023] KECA 850 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KECA 850 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 205 OF 2019

DK MUSINGA, HA OMONDI & KI LAIBUTA, JJA

JULY 7, 2023

BETWEEN

MARY MWELU MUYA .... 1ST APPELLANT

MICHAEL MUYA MUSYOKA .... 2ND APPELLANT

AND

ALIO IBRAHIM HASSAN .... 1ST RESPONDENT

BOARD OF TRUSTEE OF NATIONAL SOCIAL SECURITY FUND .... 2ND RESPONDENT

ALIO SIAD IBRAHIM .... 3RD RESPONDENT

(Being a cross appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Nairobi (E. O. Obaga, J.) delivered on 14th February 2019 in E.L.C No. 338 OF 2009)

JUDGMENT

1. The appellants (Mary Mwelu Muya and Michael Muya Musyoka) filed suit against the respondents (Alio Ibrahim Hassan, NSSF Board of Trustees and Alio Siad Ibrahim) jointly and severally in the Environment and Land Court at Nairobi in ELC Suit No 338 of 2009 seeking: general damages; permanent injunction restraining them from interfering with the 1st appellant's entitlement, ownership, quiet enjoyment and possession of plot No 419 (formerly plot No 419B); a declaration that the 2nd appellant is the owner of plot No 418; an injunction restraining the 2nd respondent from interfering therewith; and costs of the suit.
2. The appellants' case was that they had purchased the plot Nos 418 and 419 from Kwa Ndege Self - Help Group sometime in 2001.

3. The respondents defended the appellants' claim and filed their respective defences. First among them was that of the 1st respondent dated July 27, 2009 contending that the 1st appellant willfully neglected to verify the identity of the plot allotted to her by the 2nd respondent; and that her suit was an abuse of the court process. He prayed that her suit be dismissed with costs.

4. Second in line was the 3rd respondent's defence dated August 28, 2009 denying having invaded the appellants' plot No 419. His case was that he was an allottee from the 2nd respondent (NSSF Board of Trustees) of plot No 388/1; that he took possession thereof and carried out excavation thereon, deposited building materials on the site; and that the 1st appellant wrongfully prevented him from proceedings with construction thereby occasioning him loss and damage.

5. The particulars of the loss and damage allegedly suffered by the 3rd respondent were: loss of construction materials – KShs 194,950; and contractors' charges/labour – KShs 15,000 (all amounting to KShs 209,950).

6. It is on account of the loss and damage aforesaid that the 3rd respondent raised a counterclaim against the appellants claiming: general damages; special damages in the sum of KShs 209,950 and interest thereon; a permanent injunction restraining the appellants from occupying or interfering with the site allocated to the 3rd respondent; and costs of the suit.

7. In addition to the foregoing, the 1st and 3rd respondents filed a joint defence dated May 28, 2010 essentially reiterating the 3rd respondent's defence, and adding that the 1st respondent had not been allotted any plot on the ground. They prayed that the suit be dismissed with costs.

8. In its defence dated June 3, 2010, the 2nd respondent averred: that the parties reached an agreement on September 4, 2009 in terms that they proceed to the suit premises with a view of identifying the respective plots; that they proceeded to the premises on October 14, 2009 whereupon the 2nd respondent pointed out plot numbers 418, 419 and 388/1 to the parties; that plot Nos 419 and 388/1 were undeveloped; that they had not allocated the 1st respondent any plot; that the appellants were allottees of plot Nos 419 and 418 respectively; and that the 3rd respondent was the allottee of plot No 388/1. According to the 2nd respondent, the appellants had no recourse against the respondents or any of them, but that the 2nd appellant should pursue his claim against the person who entered into and developed his plot No 418. It urged the trial court to dismiss the appellant's suit with costs.

9. In her reply to the 3rd respondent's defence and counterclaim dated September 10, 2009, the 1st appellant denied that the 3rd respondent took possession of plot No 388/1 or that he had deposited any construction materials thereon. She contended that it is the 1st respondent who had attempted to undertake construction on her plot No 419, but that she successfully halted the construction and drove the 1st respondent out of the property. She prayed that the 3rd respondent's counterclaim be dismissed with costs to her.

10. It is noteworthy that the 1st respondent's name was struck out of the proceedings in the trial court and that, thereafter, he took no part therein.

11. In its judgment dated February 14, 2019, the ELC (E O Obaga, J.) ordered and directed as follows: that a permanent injunction do issue restraining the 3rd respondent from interfering with the 1st appellant's plot No 419 (formerly plot No 419B); that the appellants' suit against the 2nd respondent be dismissed with costs to the 2nd respondent; that the 3rd respondent's counterclaim be dismissed with costs to the 1st appellant; and that the 3rd respondent do pay to the 1st appellant costs of the main suit. In summary, the 1st appellant succeeded in her claim for injunctive relief against the 3rd respondent with costs awarded

to her; the appellants' suit against the 2nd respondent was dismissed with costs; and the 3rd respondent's counterclaim against the 1st appellant was dismissed with costs to her.

12. Dissatisfied with the decision of the learned judge to award costs of their suit to the 2nd respondent as against them, the appellants moved this court on appeal, but subsequently withdrew their appeal by notice dated March 13, 2023.

13. Equally dissatisfied with the decision of the trial court, the 3rd respondent filed a cross-appeal dated June 7, 2019 faulting the learned judge for: arriving at a decision against the weight of evidence; bias and want of legal basis; and for relying on hearsay and controvertible evidence.

14. In support of the cross-appeal, learned counsel for the 3rd respondent, M/s Masese & Company, filed written submissions dated November 22, 2019 in which he addressed us on issues of fact raised at the trial in the ELC. Counsel did not cite any judicial authorities on any of the issues raised for our consideration.

15. In rebuttal, Mr Makaya holding brief for Mr Muchemi for the appellants, made oral submissions requesting us to dismiss the cross-appeal. Likewise, counsel did not cite any authorities to buttress his submissions.

16. Learned counsel for the 2nd respondent, M/s P K Mbabu & Company, filed their written submissions dated March 21, 2023 in opposition to the main appeal, but which we need not consider in light of the appeal having been withdrawn. In any event, Mr Muuo appearing for the 2nd respondent took no position on the cross-appeal.

17. This being a first appeal, it is this court's duty, in addition to considering submissions by the appellants and the 3rd respondent, to analyze and re-assess the record and other evidence on record and reach our own conclusions in the matter. This approach was adopted by this Court in *Arthi Highway Developers Limited v West End Butchery Limited and 6 others* [2015] eKLR citing the case of *Selle v Associated Motor Boat Co* [1968] EA p 123.

18. In Selle's case (*ibid*), the court held that:

> "An appeal to this Court from a trial by the High Court (as well as the ELC) 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...."

19. Having examined the record of appeal and the grounds on which the 3rd respondent's cross-appeal is founded, the impugned judgment, the written and oral submissions of learned counsel for the appellants and learned counsel for the 2nd and 3rd respondents, we are of the considered view that the 3rd respondent's cross-appeal stands or falls on our findings on the following main issues of both law and fact, namely: whether the learned judge erred in arriving at the impugned decision against the weight of evidence; whether the learned judge considered hearsay evidence or extraneous matters in reaching his decision; whether the learned judge was biased in reaching his decision; whether the 3rd respondent was entitled to the prayers sought in his counterclaim; and what orders ought we to make in determination of the cross- appeal, including orders as to costs.

20. On the 1st issue, we hasten to observe that such a blanket assertion presents difficulty in understanding what it is the 3rd respondent considers as evidence that lacked the requisite weight to anchor the learned judge's decision. Put differently, we fail to appreciate what evidence the parties adduced at the trial that

was not considered in determination of the suit. Neither has the 3rd respondent demonstrated what extraneous matters were considered in reaching the impugned judgment.

21. To our mind, the record as put to us clearly sets out the factual background leading to the suit and the impugned judgment, which was rendered with clarity. As evidence revealed, in 2004, the plots which Kwa Ndege Self -Help Group purported to allocate its members were actually not their property, but the 2nd Respondents'. The 2nd Respondent put up advertisements in the press calling on those who had encroached into their land to come forward and have possession of the plots which they were occupying regularized by making payments under a tenant purchase scheme. The appellants had their plots regularized and their positions on the ground did not change. However, there were cases of members of the self-help group on the ground who missed plots due to planning carried out to comply with the Nairobi City Council Planning Regulations.

22. The evidence on record demonstrates the multi-partite approach by all players to resolve the emerging disputes. It is on the basis of the oral testimonies and evidential documents, and not on the basis of any extraneous material, that the learned Judge reached his informed decision. Accordingly, the 3rd respondent has failed to demonstrate how the impugned judgment was arrived at against the weight of evidence or on the basis of extraneous matters. Consequently, that ground fails, and that settles the 1st issue.

23. On the second issue, we take to mind the fact that the record as put to us contains testimonies, including those of the 1st appellant, the 2nd appellant, a Mr Silas Ngiela (a property manager of the 2nd respondent), and the 3rd respondent; and evidential documents, including the 1st appellant's receipts and share certificate issued by Kwa Ndege Self- Help Group, a map from the Self -Help Group identifying her plot, the 1st respondent's tenant-purchase agreement with the 2nd respondent, a survey plan by Geoinfo Surveyors, and an allotment letter from the 2nd to the 3rd respondent. The appellants and the 3rd respondent were members of the Self-Help Group and were, in our considered view, well acquainted with what comprised primary evidence adduced at the hearing before the trial court.

24. With regard to the maps, the 3rd respondent submits:

> " The maps purporting to be official maps produced by Plaintiffs 1 and 2 were not certified as the official maps of the ground area of the suit premises. Although several maps and plans were produced the Hon Trial Judge does not consider and evaluate any of them. He simply ignores this piece of evidence. "

25. Considering the evidential documents produced in evidence, including the maps aforesaid, the learned Judge observed:

> " 13. .... There are various maps which were filed in these proceedings. One map shows that plot 388/1 was created by blocking an entire road, whereas the other map shows that plot 388/1 has partly blocked a road leaving what can be called a foot path. The other map shows that there is a road to which plot 419 abuts. It is irregular to create a plot from a road reserve. Plot 388/1 may not be existing on the ground."

26. The learned judge undoubtedly considered the evidence as put to him. We find nothing on record to suggest that the 3rd respondent took issue with the production of the above-mentioned maps or with any of the evidential documents aforesaid, or otherwise challenged any of the oral testimonies on the grounds that they offended the rule against hearsay. There being no objection, the assertion that the

learned judge relied on hearsay evidence comes too late in the day and can only be considered as an afterthought for which the trial court cannot be faulted. We need not over-emphasise the fact that challenges of this nature ought to have been raised at the trial, and not afresh on appeal. Moreover, this is not a retrial, but an appeal at which issues of fact cannot be raised for the first time. Likewise, that ground fails

27. On the 3rd issue as to whether the learned judge was biased in reaching his decision, learned counsel for the 3rd respondent submits:

> " There is uncontrovertible evidence that the 2nd defendant/respondent did some practical alignments such as to block *cul-de-sac* roads and create more space for plots (see DW2's evidence stated *supra*). The maps and proposed sub- divisions were to be further approved by relevant Authorities before the same could be officially registered, on the National Cadastral records.
>
> It is clear on exhibit No 4 that the road reserve alluded to was one of this *cul-de-sac* road provision which could be closed without rendering any one of the plots without access. It was so created to provide for plot 388/1. It is not superimposed on plot No 419. In this regard, the Hon Trial Judge's finding is inconsistent with the evidence on record. This misdirection is a clear bias.
>
> .... How then does the Learned Honorable Trial judge at the Superior Court arrive at the conclusion that the 3rd defendant/respondent was the one who interfered? [with plot no 419] This was a misdirection. It is an assumption arrived at by conjecture without evidence. It is a biased presumption both in fact and against acceptable rules of evidence."

28. Counsel's submissions border on expert evidence which the 3rd respondent ought to have called to establish the claims raised by counsel in his submissions. The most that the learned judge could do was to consider what parties voluntarily submitted for his consideration and reach his findings. Indeed, nothing could have been as easy as to call expert evidence if the parties thought it necessary to do so. With due respect to learned counsel, we find nothing to impute bias on the part of the trial court.

29. An allegation of bias on the part of a judge is not a light matter to be raised by a litigant when a judicial decision does not go his or her way. Such allegations require cogent evidence to meet the high threshold for proof thereof. The Constitutional Court of South Africa in *President of the Republic of South Africa v The South African Rugby Football Union & Others* Case CCT 16/98 quoted with approval the following sentiments of Cory, J in *R v S* (R D) [1977] 3 SCR 484:

> " Courts have rightly recognized that there is a presumption that judges will carry out their oath of office .... This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with cogent evidence' that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias."

30. We find nothing in counsel's submissions to occasion reasonable apprehension of bias. None of the parties called expert evidence to contradict the findings of the trial court on what was depicted in the maps whose production remained unchallenged. Moreover, nothing prevented the 3rd respondent from adducing such evidence as would, in his view, have contradicted such findings.

31. On the 4th issue as to whether the 3rd respondent's counterclaim ought to have been allowed, he had this to say in his submissions:

> "The counterclaim in the circumstances ought to have succeeded because the 1st and 2nd plaintiffs had no legal grounds to interfere with the development the 3rd defendant/respondent had put in place, on the plot No 388/1. There was no evidence to contradict the 3rd defendant/respondent claims."

32. We hasten to observe that it was incumbent upon the 3rd respondent to establish his claim for both general and special damages. He bore the burden of proof of both ownership of the suit property, and of the value of the construction materials allegedly carted away by persons believed to be associated with the appellants. None of those burdens were discharged. Below is what the learned judge correctly observed on the matter:

> "15. The 3rd defendant claimed that his building materials worth 209,000/- were carted away by people believed to be associated with the 1st plaintiff. There was no evidence adduced to show that he accumulated material worth that much. It is the 3rd defendant who trespassed to the 1st plaintiff's land. He cannot therefore claim any general or special damages. "

33. To our mind, the law on general damages has long been settled. In *Mbogo & Another vs. Shah* [1968] EA 93, the Court, (Sir Newbold, P.) stated at page 96:

> "A court of appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice."

34. Having considered the findings of the learned judge on the evidence as adduced at the trial, we find nothing to suggest that the trial court was wrong in exercise of its discretion or otherwise misdirected itself in arriving at the impugned decision. Indeed, we find nothing to fault the learned Judge for declining to award the 3rd respondent damages as claimed in his counterclaim, and for good reason. With regard to special damages, this court in *Hahn vs. Singh* [1985] KLR 716, at pP. 717 and 721 held:

> "Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

35. It is noteworthy that, firstly, the 3rd respondent does not identify the "... persons connected with the 1st plaintiff" (the 1st appellant). Even if there was evidence of the loss complained of, we find nothing on record to suggest that such loss was attributable to the 1st appellant. Secondly, the record does not contain specific proof of the special damages complained of. In the circumstances, we reach the inescapable conclusion that the learned judge was correct in dismissing the 3rd respondent's counterclaim, and that settles the 4th issue.

36. Having considered the record of appeal, the supplementary record, the 3rd respondent's cross-appeal and the grounds on which it is founded, the rival written and oral submissions of learned counsel for the appellants and for the 2nd and 3rd respondents, we find that the 3rd respondent's cross-appeal has no merit and the same is hereby dismissed with costs to the appellants. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2023.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

H. OMONDI

....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR