Mugambi v Electricity Transmission Company Ltd (KETRACO) (Civil Appeal 205 of 2018) [2023] KECA 1048 (KLR) (24 August 2023) (Judgment)

Neutral citation: [2023] KECA 1048 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 205 OF 2018

W KARANJA, AO MUCHELULE & J MOHAMMED, JJA

AUGUST 24, 2023

BETWEEN

MARETE MAINGI MUGAMBI ..... APPELLANT

AND

ELECTRICITY TRANSMISSION COMPANY LTD (KETRACO) RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court at Meru (L.N. Mbugua, J.) dated 14th February 2018 in ELC Miscellaneous Application No. 40 of 2016 (O.S))

JUDGMENT

1. The appellant, Marete Maingi Mugambi, is the registered owner of land parcel No Ntirimiti Settlement Scheme/568 (hereinafter referred to as 'the suit property') which measures 7.04 Hectares. The respondent, Kenya Electricity Transmission Company Limited (KETRACO), is a state organ mandated to construct electricity transmission lines and associated activities throughout Kenya. The respondent desired to construct the Nanyuki-Isiolo-Meru 132KV power transmission line. It carried out a feasibility study of the project and established that the line was going to pass through various parcels of land, including the suit property. The owners were engaged with the intention of creating easements over the parcels. The suit property was going to be affected to the extent of 1.4 acres. It was agreed that the land owners would be compensated at 30% of the market value of the affected acres.

2. What was in dispute was the valuation and compensation at market value of the easement to be created over the suit property. The respondent filed originating summons in the Environmental and Land Court at Meru under section 149 of the *Land Act*, 2012 for the court to determine the existence of a right of way over the suit property and to intervene and grant it the right of entry for the purpose of constructing the power transmission line on its undertaking, inter alia, to deposit or pay the assessed compensation.

3. The suit was opposed by the appellant who contested the valuation saying that the suggested compensation for the intended easement over the suit property was not adequate nor at market value.

4. The learned Judge (LN Mbugua, J) heard the dispute, and on February 14, 2018 delivered a judgment in which she agreed with the respondent that the project was for the benefit of the general public whose benefits outweighed the appellant's private interests; that the appellant had failed to appoint a valuer with a view to settling the dispute over the valuation; and that it had not been demonstrated that the respondent was applying different standards or that the appellant was being discriminated against. The court approved the valuation report that had been carried out by GIMCO limited, which estimated the market value to be Kshs 600,000 per acre. A right of way (an easement) was ordered to be registered over 1.4 acres of the suit property, and the respondent was granted right of entry into the suit property to carry out its works.

5. The appellant was aggrieved by the judgment and decree of the Environment and Land Court (ELC) and preferred this appeal, based on the following grounds:

> ' 1) The learned trial judge erred in law and in fact as she found that the application before her by the respondent was defective and should have been dismissed or struck out.
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> 2. The learned trial judge erred in law and in fact in that she acted on and supported an application which was bad in law and which disclosed no cause of action.
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> 3. The learned trial judge erred in law and in fact in that she refused to give any weight to the appellant's case, documents or the valuation report.
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> 4. The learned trial judge erred in law and in fact in that she allowed herself to be influenced by the issue of public interest forgetting that the individual citizen had also interest to be protected by the court.
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> 5. The judgment of the learned trial judge is against the weight of the material placed before her.
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> 6. The decision/judgment of the learned trial judge is bad in law as it did not sufficiently consider the pleadings, documents and the material filed by the appellants and only gave attention to the respondent.'

1. During the hearing of the appeal, learned counsel Mr Mwendwa appeared for the appellant and learned counsel Mr Wachira appeared for the respondent. Counsel had filed written submissions on which they each sought to rely. However, learned counsel Mr Wachira raised a preliminary point, that the appeal was incompetent because it had been filed out of time and without leave. Reiterating what he had pointed out in the written submissions, learned counsel's case was that, after the notice of appeal was filed on time, the appellant had not complied with Rule 84(1) of the *Court of Appeal Rules, 2022* as the record of appeal had not been filed within 60 days. Even if the appellant were to rely on the proviso to Rule 84(2) of the Rules, he had not within 30 days of the judgment sought for a certified copy of the proceedings and judgment; that he had written a letter bespeaking proceedings 100 days after the judgment and, even then, he had not served the letter bespeaking proceedings on the respondent. Further, the appellant had not sought the extension of time, under Rule 4 of the Rules, to be allowed to lodge the appeal out of time. Counsel relied on the decisions of this Court in *Tharaka Nithi County Government & Another –v- Gaichu & 129 Others [2022]KECA 585 (KLR*) and

Mae Properties Limited –v- Joseph Kibe & Another [2017]eKLR, and prayed that the appeal be deemed to be withdrawn.

7. The other preliminary challenge to the appeal was in regard to the competence of the filed record of appeal. Learned counsel for the respondent pointed out that the record of appeal was required under Rule 89(1)(h) of the Rules to contain a copy of the certified decree or order, and yet what the appellant had filed was a copy of decree which had not been certified. Learned counsel submitted that, since leave had not been sought to file a supplementary record of appeal to include a certified copy of the decree, the appeal was fatally defective and incompetent. Reliance was placed on the Supreme Court's decision in *Bwana Mohamed Bwana –v- Silvano Buko Bonaya & 2 Others [2015]eKLR*.

8. Learned Counsel for the appellant did not file any subsequent written submissions to deal with the questions relating to the competence of the appeal. While orally addressing the Court, however, he conceded that the certificate of delay dated October 25, 2018 alluded to the delay which was attributed to there being problems with the acreage of the suit land which had to be rectified by the learned Judge following application. This had delayed the signing of the decree.

9. In other words, there was no response to the issues regarding the competence of the appeal as raised by the respondent.

10. We have carefully considered the questions relating to the competence of the appeal. Rule 84(1) of the Court of Appeal Rules, 2022 provides as follows:-

> ' 1) Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged—
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> a. A memorandum of appeal, in four copies;
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> b. The record of appeal, in four copies;
>
> c. The prescribed fee; and
>
> d. Security for the costs of the appeal: Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.'

11. It is admitted that the record of appeal was not lodged within 60 days following the filing of the notice of appeal. The appellant wrote a letter to the trial court to be provided with certified copies of the proceedings, judgment and decree which were necessary to lodge the record of appeal. And his case was that there was delay in supply of these documents. The Rules anticipate such a delay and that is why Rule 84(1) has the proviso indicated above. But to be able to rely on the proviso to Rule 84(1), the appellant has to bring himself/herself within Rule 84(2) of the Rules which states as follows:-

> ' An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless the appellant's application for such copy was in writing and a copy of the application was served upon the respondent.'

12. One, the appellant did not within 30 days from the date of the judgment write to the trial court to ask for a copy of the proceedings. The letter was written to the trial court about 100 days following the

judgment. Secondly, the letter was not copied to the respondent. Reliance could not therefore be placed on the proviso to Rule 84(1) of the Rules. Once the appellant found himself in the circumstances of delay he ought to have applied under Rule 4 of the Rules for extension of time to lodge the appeal out of time. The Rule provides as follows:-

> ' The Court may on such terms as it thinks just, by order extent the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorised or required by these Rules, whether before or after the doing of the ac, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.'

No such application was made to this Court. As was stated in Mae Properties Limited –v- Joseph Kibe & Another (supra), the notice of appeal in this matter died a natural death after the expiry of 60 days, now that time was not extended by the operation of the proviso to Rule 84(1) of the Rules, and because no request for the extension of time to file the appeal out of time was made and allowed under Rule 4 of the Rules.

13. The consequence of this non-compliance with these mandatory provisions of the Rules is contained in Rule 85(1) and (2) of the Rules as follows:-

> ' (1) If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, that party shall be deemed to have withdrawn the notice of appeal and the Court may, on its own motion or on application by any other party, make such order.
>
> (2) The party in default under sub-rule (1) shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.'

14. We hope we have said enough to be able to determine that:-

a. The notice of appeal that the appellant lodged following the judgment that was delivered on February 14, 2018, and which aggrieved him, is hereby deemed to have been withdrawn; and

b. The appellant shall pay to the respondent the costs of this appeal.

Dated and delivered at Nyeri this 24th day of August 2023

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR