



Juma & 2 others v National Land Commission & 3 others (Civil Appeal 101 of 2018) [2023] KECA 1334 (KLR) (10 November 2023) (Judgment)

Neutral citation: [2023] KECA 1334 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL 101 OF 2018
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
NOVEMBER 10, 2023**

BETWEEN

**MWANAJUMA JUMA 1ST APPELLANT
FATUMA JUMA 2ND APPELLANT
MWANAPILI SAID 3RD APPELLANT**

AND

**MOHAMED HAMIS MWAJAMWANDA 1ST RESPONDENT
NATIONAL LAND COMMISSION 2ND RESPONDENT
WINNIE MWAKA MJAMBILI 3RD RESPONDENT
MARK AFANDE MJAMBILI (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF THE PETER BAMBULA MJAMBILI) 4TH RESPONDENT**

(An appeal from the ruling of the Environment and Land Court at Malindi (Hon. Justice J.O Olola) delivered at Malindi on 25th May, 2018 in ELC Misc. Application No. E10 of 2017)

JUDGMENT

1. By a Notice of Motion dated 9th October, 2017, filed in Malindi ELC Misc. Application No. E10 of 2017, the appellants, Mwanajuma Juma, Fatuma Juma and Mwanapili Juma, moved the Environment and Land Court sitting in Malindi seeking substantially the following orders:
 1. Pending the hearing and determination of this application, this Honourable Court be pleased to stay any further action in the suit herein;



2. Upon inter-partes hearing, this Honourable Court be pleased to grant leave to enjoin Mwanajuma Juma, Fatuma Juma and Mwanapili Said as parties to this suit;
 3. Upon inter-partes hearing, this Honourable Court be pleased to set aside the proceedings in the suit herein.
 4. Costs of this Application be provided for.
2. The application was supported by the affidavit of Mwanajuma Juma. The grounds upon which the application was based were that the 1st respondent and the appellants were the rightful surviving heirs to the Estate of Amuri Wakalama Haji, the registered owner of the suit property, LR No. Plan Group XVII No.13 situated at Mida Kilifi County who died in 1932; that the appellants had great interest in the suit property and therefore it was only fair that they be joined as parties to the suit; that the appellants' presence before the Court was necessary in order to enable the Court to effectively and completely adjudicate upon and settle all questions involved in the suit; and that unless the orders sought in the application were granted, the appellants were likely to suffer irreparable loss and damage.
 3. In opposition to their application, the 4th respondent filed a Replying Affidavit on 16th October, 2017. It was averred that the Court was functus officio hence bereft of jurisdiction; that the application was misconceived and bad in law since the appellants were not parties to ELC Civil Case No. 150 of 2015; that the Court was being called to sit on appeal in respect of its own judgment delivered, executed and implemented; that the application was an abuse of the court process and lacked merit; that the 1st appellant was guilty of misleading the Kadhi's Court to improperly obtain the order incorporating the suit property in the assets of the deceased; and that the deceased died in 1932 and the Limited Grant of Letters of Administration were only obtained on 5th October 2017 way after the Judgment dated 24th June 2014 was delivered and a declaration made that the property be returned to Peter Bambula Mjambili in ELC No. 150 of 2015.
 4. The learned Judge (Olola, J) dismissed with costs the appellants' said application and observed that it was not in dispute that the proceedings which the appellants sought to join and to have set aside were concluded in Malindi ELC Civil Case No.150 of 2015 when the Angote, J rendered his Judgment on 24th June 2014; that no explanation was given by the appellants why they failed to be join in ELC 150 of 2015 and instead sought Grant of Letter of Administration in 2017, long after the said case was concluded.
 5. Before us is an appeal filed by the appellants against the said decision. The 3rd and 4th respondents also filed a Notice of Cross Appeal dated 16th November, 2018.
 6. We heard this appeal on this Court's virtual platform on 3rd July, 2023 during which learned counsel Mr Kandia holding brief for Mr Ole Kina appeared for the appellants, while Mr Tindi appeared for the 3rd and 4th respondents. There was no appearance for the 1st and 2nd respondents though their advocates on record were duly served with the hearing notice.
 7. As regards the appeal, it was contended on behalf of the appellants that the learned Judge failed to join them in the suit yet they are the rightful surviving heirs of the registered owner of the suit property; that the learned Judge erred by failing to set aside the judgment in Malindi ELC Civil Case No.150 of 2015; that Amuri Wakalama Haji was registered as the owner of the suit property in 1911 and a certificate was issued on 23rd November, 1911 and since then the suit property has remained the property of the family; that together with Aisha Said Amri they were found to be the rightful heirs of the Estate of Amuri Wakalama Haji by the Kadhi's Court in Malindi Succession Cause No.23 of 2017 hence they



were necessary parties to be joined in the suit; that they were unaware of the existence of Malindi ELC Civil Case No.150 of 2015 since they were never served with any pleadings in the suit. In support of their position, the appellants cited, inter alia, the case of *Shah vs Mbogo* [1968] EA 93 on the applicable principles to consider in exercise of judicial discretion while seeking to set aside a judgment or not. The appellants asserted that they have a great interest in the suit property.

8. On behalf of the 3rd and 4th respondents, it was submitted, in opposition to the appeal, that the appellants cannot be surviving heirs to a property that had a decree and belonged to a Peter Bambula Mjambili who was a non-muslim; that the appellants misled the Kadhi's Court to distribute Plot No. 13 which has a decree of the High Court; and that the appellants had obtained letter of administration upon a property that had already been sold by their grandfather to a third party.
9. As regards the Notice of Cross-Appeal dated 16th November, 2018, the same was directed at the judgment delivered on 29th November, 2017. In that Notice of Cross-Appeal, the 3rd and 4th respondents urged the court to set aside the judgment and that the property namely LR. Mida (Malindi) Plot No. XVII/13/212 decreed to Peter Bambula Mjambili (Deceased) be delivered to the 3rd and 4th Respondents and any person on the suit property be evicted.

Analysis and Determination

10. We have considered the evidence on record, the submissions by and on behalf of the parties to this appeal and the authorities cited.
11. This being the first appeal, we are mindful that the duty of this Court as set out in the decision of *Selle & Another vs Associated Motor Boat Co. Ltd & Others* [1968] EA 123 is to reconsider the evidence, evaluate it and draw our own conclusion of facts and law, and we will only depart from the findings by the trial Court if they were not based on evidence on record; where the said Court is shown to have acted on wrong principles of law as was held in *Jabane v Olenja* [1968] KLR 661, or where its discretion was exercised injudiciously as held in *Mbogo & Another v Shah* [1968] EA 93.
12. We wish to deal with the Notice of Cross-Appeal dated 16th November, 2018 filed by the 3rd and 4th respondents first. Rule 95 of the Court of Appeal Rules, 2022 provides that:
 1. A respondent who desires to contend at the hearing of the appeal that the decision of the superior court or any part thereof should be varied or reversed, in any event or in the event of the appeal being allowed in whole or in part, shall give notice to that effect, specifying the grounds of the contention and nature of the order which he or she proposes to ask the Court to make, or to make in that event, as the case may be.
 2. A notice under sub-rule (1) shall state the names and addresses of the persons intended to be served with copies of the notice and lodged in four copies in the appropriate registry not more than thirty days after service on the respondent of the memorandum of appeal and record of appeal, or not less than thirty days before the hearing of the appeal, whichever is the later.
 3. A notice of cross-appeal shall be substantially in Form G, as set out in the First Schedule and signed by or on behalf of the respondent.
13. It is pertinent to note that rule 95(1) employs the phrase a respondent who desires to contend at the hearing of the appeal. This rule must be read with reference to the appeal that is before the Court. The Notice of Cross-Appeal must therefore with reference to the appellant's appeal and not any other



appeal that is not before the Court. A Notice of Cross-Appeal is in the nature of a Counterclaim in a suit. It must arise from the proceedings which are before the Court. If a Notice of Cross-Appeal were to be accepted to challenge a decision other than the one before the Court, it would place the Court in a difficult situation since the proceedings upon which the Notice of Cross-Appeal would be based would not be before the Court and therefore the Court would not be able to determine the issues being raised in the Notice of Cross-Appeal.

14. This Court in *Japheth Angila v Paul Ojigo Omanga Civil Appeal No. 58 of 2008* held that it is imprudent and indeed an abuse of the court process if a respondent served with a Notice of Appeal also lodges a memorandum of appeal and record of appeal after being served with those lodged by the appellant. While the respondent may lodge a supplementary record of appeal upon being served with the record, he is not to lodge the record of appeal. Therefore, since a respondent cannot lodge a record of appeal, his Notice of Cross Appeal lodged against a decision other than that which the appellant is appealing against would lack supporting documents. Such a procedure would also open a window to those who ought to have appealed against a decision and against whom time to do so has run out to improperly ride on the back of the appellant's appeal in order to attack a decision which is not the subject of an appeal. As was held by the Supreme Court of Uganda in *Musab v Muwonge [2007] 1 EA 212*, the object of a Notice of Cross-Appeal is to avoid multiplicity of suits.
15. We therefore find that the Notice of Cross-Appeal by the 3rd and 4th respondents, dated 16th November, 2018, is incompetent and misconceived. The same is struck out.
16. Back to the main appeal. The appellants sought to stay proceedings; to be joined as parties to the suit; and the setting aside of the proceedings in the suit. All these reliefs were discretionary in nature. In deciding the appeal, we are guided by the Supreme Court authority of *Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 Others (2019)* eKLR in which it was reiterated:

“...that in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court case of *Kacem v. Bashir* (2010) NZSC 112; (2011) 2 IVZLR 1 (Kacem) where it was held:

“In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are stricter: (1) error of law or principle;

2. taking account of irrelevant considerations;
3. failing to take account of a relevant consideration; or (4) the decision is plainly wrong.”

17. It was therefore held by this Court in *Price & Another v Hilder [1986] KLR 95* that it would be wrong for the Court to interfere with the exercise of the trial court's discretion merely because the Court's decision would have been different. The Supreme Court of Uganda, in *Kiriisa v Attorney-General and Another [1990-1994] EA 258* held that it is settled law that the discretion must be exercised judiciously and an appellate Court would not normally interfere with the exercise of the discretion unless it has not been exercised judiciously. As to what the term “discretion” connote the Court stated that:

“Discretion simply means the faculty of deciding or determining in accordance with circumstances and what seems just, fair, right, equitable and reasonable in those circumstances.”



18. The issue before us in this appeal is whether in the circumstances of this case, the trial court was justified in dismissing the appellants' application for joinder. The learned Judge was swayed in arriving at his decision by the decision of this Court in in *JMK -vs- MWM & Another [2015]* eKLR in which it was held that:

“.....Order 1 Rule 10(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. Sarkar's Code (Supra) quoting as authority, decisions of Indian Courts on the provision, express the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania while considering the equivalent of Order 1 Rule 10(2) of our Civil Procedure Rules, in *Tang Gas Distributors Ltd -vs- Said & Others(2014)EA 448*, stated that the power of the Court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after Judgment where damages are yet to be assessed; that it is only when a suit or proceedings has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.”

19. The learned Judge factually found that the proceedings which the appellants seek to join and to have set aside were concluded in Malindi ELC Civil Case No. 150 of 2015 when Angote, J rendered his Judgment on 24th June 2014. He further found that the appellants had not stated any reason why they failed to be joined to ELC 150 of 2015 prior to its conclusion and that other than stating that they are, in addition to the 1st Respondent, the heirs of the Estate of Amuri Wakalama Haji, who died in 1932, no explanation was offered whatsoever as to why they only sought the Grant of Letter of Administration in 2017 long after the said case was concluded. He therefore found no merit in joining the appellants to the matter at that stage as well any reason to set aside the proceedings in ELC 150 of 2015.

20. While we fault the learned Judge for his finding that there was no reason given by the appellants for not seeking to be joined to the proceedings earlier on, we have no reason to fault him for his other findings. The reason why we fault him is that the appellants did proffer a reason for not moving the court earlier, and this was the fact that they were unaware of those earlier proceedings. Whether or not that reason was valid was another issue altogether. That said, it was a finding of fact, which finding has not been challenged before us, that the application was made after judgement had been made in the earlier suit. Based on the decision of this Court, the learned Judge cannot be faulted for finding that at that stage the appellants could not be joined to the proceedings. Therefore, if the appellants could not be joined in the proceedings, the other prayers that depended on their being joined must necessarily collapse.

21. In the premises, we find no merit in this appeal which we hereby dismiss with costs to the 3rd and 4th respondents.

22. Judgement accordingly.

DATED AND DELIVERED AT MOMBASA THIS 10TH DAY OF NOVEMBER, 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

DEPUTY REGISTRAR

