



REPUBLIC OF KENYA



KENYA LAW
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**Wairimu & 4 others v Maina & 2 others (Civil Appeal
87 of 2017) [2022] KECA 646 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KECA 646 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 87 OF 2017
RN NAMBUYE, F SICHALE & S OLE KANTAI, JJA
APRIL 28, 2022**

BETWEEN

**MILLICENT WAIRIMU 1ST APPELLANT
WILSON NJERU NJOKA 2ND APPELLANT
DOROTHY NJOKI NJOKA 3RD APPELLANT
EMILY WANJA NJOKA 4TH APPELLANT
PHILLIS WANGUI NJOKA 5TH APPELLANT**

AND

**JOHNSON NYAGA MAINA 1ST RESPONDENT
GICHUGU LAND CONTROL BOARD 2ND RESPONDENT
MAPZONE COMPANY 3RD RESPONDENT**

*(An appeal against the Ruling of the Environment and Land Court of
Kenya at Kerugoya (Olao, J.), dated 21st April 2017) in (ELC Cause No.
57 of 2016 as Consolidated with Gichugu CMCC Case No. 5 of 2016)*

JUDGMENT

1. Millicent Wairimu, Wilson Njeru Njoka, Dorothy Njoki Njoka, Emily Wanja Njoka and Phillis Wangui Njoka (the appellants herein), have filed this appeal against the ruling of Olao, J. dated 21st April 2017.
2. The appeal arises from a motion that had been filed at the Environment and Land Court in Kerugoya by the 1st respondent on 21st October 2016, seeking inter alia an order to commit the appellants to civil jail for a term of six months for contempt of court for having deliberately disobeyed orders issued by



the court on 5th April 2016 and 19th May 2016. (Though the parties indicated that the said orders were issued on 5th April 2016, the record clearly indicates that they were issued on 1st April 2016.)

3. Be that as it may, subsequently thereafter, the appellants filed a Notice of Preliminary Objection on 16th November 2016, contending *inter alia* that the orders issued on 5th April 2016 by the Senior Principal Magistrate's Court at Gichugu were issued per incuriam and that the Court issuing the said orders lacked the requisite jurisdiction in view of Article 162 (2) of [the Constitution](#) of Kenya, 2010 and the [Environment and Land Court Act](#) 2012.
4. The motion was heard by Olao, J. who in a ruling delivered on 21st April 2017, dismissed the appellants Preliminary Objection and held *inter alia* as follows:

The Notice of Motion dated 21st October 2016 is allowed but only to the extent that it seeks the committal of Dorothy Njoki Njoka, Emily Wanja Njoka and Philis Wangui Njoka to civil jail for a term of six (6) months for contempt.”

5. The appellants were aggrieved by the aforesaid ruling thus provoking the instant appeal vide a Notice of Appeal dated 21st April 2017 and a memorandum of appeal dated 20th June 2017, raising the following grounds of appeal; that the learned Judge Mr. B.N Olao erred in law and fact in holding the appellants to be in contempt of the court without a nexus of their alleged actions and the vis a vis violation of the said court order dated 1st April, 2016 by upholding and enforcing incompetent court order dated 1st April 2016 that was issued irregularly, un-procedurally thus null and void, in finding that the consolidation of CMCC No. 5 of 2016 and ELC No. 57 of 2016 by consent of the parties was lawful, misdirected and erred in law and fact while exercising supervisory jurisdiction when he found that the orders dated 1st April 2016 were issued by a court of competent jurisdiction, by failing to appreciate that there were conservatory orders issued on the 14th March 2016 vide the Malindi Constitutional Petition No.3 of 2016 ousting the jurisdiction of the gazetted magistrate's court pursuant to the suspension of Section 26 (3) and (4) of the [Environment and Land Court Act](#), when he found that the orders dated 1st April were not per incuriam while the same were issued by a court devoid of jurisdiction vide the conservatory orders issued on the 14th March 2016 in the Malindi Constitutional Petition No. 3 of 2016, in failing to interrogate whether the Resident Magistrate Honourable M. Nasimiyu had been gazette as an ELC court vide gazette notices No. 1472 of 11th March and 1745 of 18th March 2016 and thus competent to issue the injunctive relief in respect to the land.
6. The brief facts in this appeal are that on or about 16th March 2016, the 1st respondent had instituted Gichugu SPMCC No.5 of 2016 (hereinafter the Gichugu case), in which he had named the 3rd, 4th and the 5th appellants herein as the defendants. On 1st April 2016, injunctive orders were issued restraining the 3rd, 4th and 5th appellants from inter alia interfering with the suit property in the presence of the advocates for the appellant and the 1st respondent.
7. On 28th April 2016, the appellants instituted Kerugoya ELC Case No. 57 of 2016 (at the High Court) and sued the 1st respondent over the same parcel of land and further obtained injunction orders against the 1st respondent on 3rd May 2016, which orders the appellants obtained without informing the Court that similar orders had been issued in the Gichugu case over the same subject matter in favour of the 1st respondent and against the 3rd, 4th and 5th respondents.
8. The two suits were subsequently consolidated with the consent of the parties and the orders obtained by the appellants set aside and status quo ordered to be maintained. The appellants later disobeyed the orders issued in the Gichugu case whereupon the 1st respondent moved the court vide an application dated 21st October 2016, seeking to commit the appellants to civil jail for contempt of



court. Thereafter, the appellants filed a preliminary objection dated 17th November 2016, seeking to oust the 1st respondent's application dated 21st October 2016. Vide a ruling delivered on 21st April 2017, Olao, J. dismissed the appellants' preliminary objection and *inter alia* allowed the 1st respondent's application and found the 3rd, 4th and 5th appellants to be in contempt of court, thus provoking the instant appeal as stated above.

9. The appeal was urged by way of written submissions with oral highlights by the parties on 7th December 2012. Mr. Ndegwa Mwangi learned Counsel appeared for the appellants whereas Miss Makwaro, learned Counsel appeared for the 1st respondent. There was no appearance for the 2nd and 3rd respondents.
10. The court being satisfied that the 2nd and 3rd respondents had due notice of the hearing date, having been served electronically with a hearing notice by the Deputy Registrar of this Court on Tuesday, 23rd November, 2021 at 11.52 am, allowed learned Counsel present to prosecute the appeal.
11. The appellants sought to condense grounds 1, 2 and 4 into one limb and grounds 5, 6 and 7 into another whereas ground 3 was urged alone. It was submitted that the learned Judge erred in law and fact by failing to appreciate that there were conservatory orders issued on 14th March 2016, in Malindi Constitutional Petition No.3 of 2016, ousting the jurisdiction of the gazetted magistrate's court pursuant to the suspension of Section 26 (3) and (4) of the *Environment and Land Court Act* which conservatory orders operated as a stay on all matters filed before the magistrate's court as well as placing a blanket caution on any new filing of such matters.
12. That in the current case, the Gichugu case was filed on 16th March 2016, 2 days after the conservatory orders were issued and that had the judge considered that there were conservatory orders issued on 14th March 2016, that operated as a stay, his findings would have been different.
13. With regard to the alleged contempt of court, it was submitted that Order 40 Rule 3 of the Civil Procedure Rules was clear that the Court granting an injunction was the only one seized with statutory powers to punish for contempt of court where jurisdictional circumstances so permit and that therefore the ELC Court could not punish for contempt of orders that did not originate from it and was not the court issuing the orders and as a result, it could not punish for contempt for breach of orders obtained in another Court devoid of jurisdiction.
14. It was further submitted that the learned Judge erred in law and fact in finding that the consolidation of the Gichugu case and ELC No. 57 of 2016, by consent of the parties was lawful and that the fundamental question was whether there was anything to transfer as the Gichugu case was instituted in a court that did not have jurisdiction ab initio and that not even a consent of the parties could breathe life to an irregular, illegal and void process.
15. On the other hand, it was submitted for the 1st respondent that from the grounds of appeal two issues arise for determination. These are:
 1. Whether the Gichugu Resident Magistrate had jurisdiction to deal with the matter filed before the said court.
 2. Whether the Environment and Land Court had jurisdiction to hear an application for contempt for orders not issued by the said court after consolidation of Gichugu Civil Case No. 5 of 2016 and Kerugoya ELC 57 of 2016."
16. With regard to the first issue, it was submitted that Section 26 (3) and (4) of the *Environment and Land Court Act* empowered the Chief Justice to appoint certain magistrates to preside over cases involving the



environment and land and that one of the findings in the Malindi decision was that the amendment of Section 26 was unconstitutional and therefore null and void, which decision was overturned on appeal.

17. It was further submitted that even before the amendment of Section 26 of the *Environment and Land Court Act* to insert Sections 26 (3) and (4), the Magistrates Court had jurisdiction to handle land matters which was not taken away by the enactment of the *Environment and Land Court Act* 2012 and that under Section 13 of *the Act*, the Environment Land Court (High Court) has appellate jurisdiction which means that jurisdiction can only be exercised while hearing appeals from the subordinate court and that as such, conservatory orders that had been issued had no effect on the case filed in the lower court.
18. Regarding the second issue, it was submitted that after the injunctive orders were issued, the appellants did not file an appeal and that further the files were consolidated by the consent of the parties and that the appellants again never appealed against the same and that they only raised the issue of jurisdiction and consolidation after the 1st respondent filed the application for contempt. It was thus submitted that following consolidation of the two cases, the Environment and Land Court had control over the proceedings that had taken place in the lower Court and had full powers to enforce any order that had been issued by the Court.
19. We have carefully considered the record, the grounds of appeal, the rival submissions by the parties, the responses thereto, the cited authorities and the law. We are required as a first appellate court by rule 29 of the *Court of Appeal Rules*, to re-appraise the evidence and to draw inferences before coming to our own independent conclusion. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123.
20. From a cursory perusal of the grounds of appeal, it can be discerned that there are three main broad issues for determination as follows:
 1. Whether the Gichugu Resident Magistrate had jurisdiction to deal with the matter filed before the said Court?
 2. Whether the learned Judge erred in finding that the consolidation of CMCC No.5 of 2016 and ELC No. 57 of 2016 by consent of the parties was lawful.
 2. Whether the learned Judge had jurisdiction to hear an application for contempt for orders issued by the subordinate court after consolidation of Gichugu civil case number 5 of 2016 and Kerugoya ELC 57 of 2016.”
21. Regarding the first issue, it is indeed not in dispute that the 1st respondent herein had on 16th March 2016 filed Gichugu SPMCC No. 5 of 2016 against Dorothy Njoki Njoka, Emily Wanja Njoka and Philis Wangui Njoka (the 3rd, 4th and 5th appellants respectively herein), seeking *inter alia* injunctive orders against the said appellants from interfering with quiet possession of the suit property.
22. It is also not in dispute that on 1st April, 2016, Hon. Nasimiyu (Resident Magistrate), issued injunctive orders against the aforesaid appellants in the presence of their counsel Mr. Ndegwa having found that the 1st respondent’s application was not opposed. It is imperative to note that the appellants did not raise the issue of jurisdiction at that particular point in time and to date they have never appealed nor applied for review of those orders which were issued in the presence of their counsel. They therefore remain valid orders of the Court and demand obedience. See *Henderson vs. Henderson* [1843-60] All E.R
23. It was contended by the appellants that the learned Judge erred in law and fact by failing to appreciate that there were conservatory orders issued on 14th March 2016, vide Malindi Constitutional Petition



No. 3 of 2016, ousting jurisdiction of the gazetted Magistrate's Court pursuant to the suspension of Section 26 (3) and (4) of the [Environment and Land Court Act](#).

24. The learned Judge while addressing this issue in his ruling stated inter alia as follows:

"One of the findings of the Court in that Petition was that the amendment to Section 26 (3) and (4) of the [Environment and Land Court Act](#) that empowered the Chief Justice to appoint certain magistrates to preside over cases involving the Environment and Land was unconstitutional and therefore null and void. That judgment which was delivered on 11th November 2016 was however stayed by the Court of Appeal in C.A Civil Application No.65 of 2016 on 13th December 2016. The judgment in the Court of Appeal is still pending and is due on notice meaning that the position obtaining at 11th November 2016 remains. In any event, the orders in the Gichugu case were issued on 1st April 2016 some seven (7) months before the judgment in the Malindi Petition No. 5 of 2016 was delivered. Therefore, the judgment in the Malindi Petition No. 3 of 2016 could not have taken away the jurisdiction of the Resident Magistrate who issued orders in the Gichugu case as such judgment could not act retrospectively. Most importantly, however, my view has always been that even long before the amendments to Section 26 of the [Environment and Land Court Act](#) to insert Section 26 (3) and (4) empowering the Chief Justice to appoint magistrates to handle Environment and Land Cases, magistrates had jurisdiction to handle such cases which was not taken away by the enactment of the [Environment and Land Court Act](#) 2012."

25. The learned Judge further went on to state:

"Nothing has been placed before me to suggest that the reliefs that were sought by the 1st defendant in the Gichugu case were beyond the Resident Magistrate's pecuniary jurisdiction. In any event as will become later in this ruling, it is now well settled that once a court issues an injunctive relief, the party to whom it is directed is obliged to obey it notwithstanding any misgivings about whether or not it ought to have been granted in the first place. I am similarly not persuaded that the order issued on 5th April 2016 by the Resident Magistrate at Gichugu Court was per incurium as suggested by counsel for the plaintiffs. A ruling or judgment is said to be per incurium where the judge or magistrate has not taken into account a previous decision that is binding or where it has been rendered in ignorance of legislation- *Black's Law Dictionary 9th Edition*." (Emphasis ours).

26. The above finding by the learned Judge notwithstanding, on 19th October 2017, a 5 Judge Bench of this Court (differently constituted), ordered inter alia:

The order of Certiorari issued by the High Court quashing Gazette Notice Numbers 1472 dated 1st March 2016 published on 11th March 2016 and 1745 dated 14th March 2016 published on 18th March 2016 is hereby set aside."

27. From the foregoing it is evident that the contention by the appellants that the learned Judge erred by failing to appreciate that there were conservatory orders issued on 14th March 2016, vide Malindi Constitutional Petition No. 3 of 2016 ousting the jurisdiction of magistrate's Courts to hear land matters is wholly erroneous.

28. If the appellants had found the injunctive orders issued by the magistrate on 1st April 2016 to be irregular, null and void as they are now contending, nothing would have been easier than to appeal against the same or file an application for review to set aside the same. In any event the issue before



the learned Judge was not an appeal against the injunctive orders issued by the magistrate on 1st April 2016. Consequently, this ground of appeal is without merit and the same must fail. Similarly, the contention by the appellants that the orders issued by the magistrate on 1st April 2016, were issued per incuriam is without basis as the conservatory orders issued by the High Court on 14th March 2016 were subsequently set aside by this Court on 19th October 2017.

Consequently, nothing turns on these two grounds of appeal and they must fail.

29. The learned Judge was further faulted for finding that the consolidation of the Gichugu case and ELC No. 57 of 2016 by consent of the parties was lawful. To start with, it is indeed not in dispute that on 16th March 2016, the 1st respondent had filed suit against the appellants and further obtained injunctive orders on 1st April 2016 at the Gichugu Court. It is also not in dispute that on 28th April 2016, the 1st and 2nd appellants filed ELC Case No. 57 of 2016 against the respondents herein seeking inter alia injunctive orders against the 1st respondent which orders were allowed by the High Court on 3rd May 2016.
30. It is instructive to note that the learned Judge in his ruling dated 21st April 2017, observed that the Court was not informed about the prior injunctive orders issued on 1st April 2016, in the Gichugu case in favour of the 1st respondent in respect to the same parcel of land. It is also not in dispute that on 11th May 2016, an order for stay of the orders issued on 3rd May 2016, was made by consent in the presence of advocates for the appellants and the 1st respondent. It is also not in dispute that when the parties appeared for mention before the learned Judge on 3rd June 2016, Miss Muthike for the 1st respondent sought consolidation of Kerugoya ELC Case No. 57 of 2016 with the Gichugu case but the Judge was reluctant to do so since Mr. Ndegwa for the appellants was not present whereupon he directed that the matter be mentioned in the presence of all parties. Subsequently thereafter on 5th October 2016, the two suits were consolidated by consent of counsel for all the parties. How then can the appellants turn around and say that consolidation of the two suits by consent of the parties was not lawful?
31. The principles that appertain to setting aside of a consent order are well established in a line of cases including *Brooke Bond Liebig vs Mallya* (1975) EA 266 where Mustafa Ag. VP stated thus:

"The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed."
32. And in the case of *Flora N. Wasike vs Destimo Wamboko* [1988] eKLR Hancox JA cited Setton on Judgments and Orders (7th edition) Vol 1 page 124, and reiterated that:

"Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement."
33. From the above cases we have cited, it is evident that a consent order can only be set aside if there is evidence that the same was procured through fraud, non-disclosure of material facts or mistake or for



a reason which would enable a court set it aside. From the circumstances of this case, none of these factors have been demonstrated to have existed to warrant setting aside of the consent order between the parties. As a matter of fact, it would appear that the factors that precipitated consolidation of the two suits was the subsequent filing of ELC Case No. 57 of 2016 by the 1st and 2nd appellants and obtaining of injunctive reliefs against the 1st respondent without informing the court/concealing from the court that the 1st respondent had already obtained similar orders in the Gichugu case on 1st April 2016 over the same subject matter against the 3rd, 4th and 5th respondents.

34. As was rightly observed by the trial Judge, the essence of consolidation is to facilitate the efficient and expeditious disposal of disputes which is among one of the overriding objectives of the Civil Procedure Rules and we hasten to add to save on costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. Consequently, we are unable to agree with the appellants' contention that the consolidation of the two suits herein was not lawful and more so when the same was done with the consent of the parties. We therefore have no reason to fault the learned Judge for the reasoning and conclusion he arrived at on this point. The upshot of the foregoing is that this ground of appeal is without merit and the same must as well fall by the wayside.
35. Finally, it was contended for the appellants that the learned Judge did not have jurisdiction to hear an application for contempt for orders issued by the subordinate court after consolidation of the Gichugu case and Kerugoya ELC No. 57 of 2016. It is indeed not in dispute that the injunctive orders dated 1st April 2016 were issued by the Gichugu court and not the ELC Court (the High Court). The two suits were subsequently consolidated with the consent of the parties on 5th October 2016. It therefore follows that the Magistrate's Court proceedings were subsumed into and/or fused with the High Court proceedings.

The net effect of the consolidation subsuming and or fusing of the two processes was that effective the date of consolidation i.e. 5th October 2016, the Gichugu Court became functus officio and was no longer seized of the matter. Where else was the 1st respondent expected to file the contempt application to enforce the orders issued by the Gichugu Court on 1st April 2016?

36. The learned Judge while addressing this issue in his ruling stated inter alia as follows:

"it is of course correct that the orders dated 1st April 2016 were issued by the Gichugu Court and not this Court. It is also correct that under Order 40 Rule 3 (1) of the Civil Procedure Rules, the Court granting the injunction is the one empowered to commit the contemnor to prison or order the attachment of his property. However, the parties having consented to the consolidation of this case and the Gichugu case, this Court is empowered to enforce the order issued on 1st April 2016 because they become orders of this Court upon consolidation of the two cases. It cannot be practicable that following the consolidation, this Court again dismembers the two suits so that the Gichugu case is returned to the Resident magistrate to handle the contempt proceedings and thereafter return the file to this Court. The consequence of the consolidation of the two cases is that this Court can now enforce any orders issued by the Gichugu Court since it is now seized of this suit and any previous orders must be treated as this Court's orders for enforcement."

37. From the circumstances of this case, it is evident that the learned Judge arrived at the correct finding and conclusion and we have no reason or basis to interfere with his findings on this issue. Consequently, this ground is also without merit and the same fails.
38. We think we have said enough to demonstrate that this appeal is without merit and the same must fail. Accordingly, the appellants' appeal is hereby dismissed in its entirety with costs to the 1st respondent.



39 It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

