Mburu & 2 others v Karasha (Suing in Her Capacity as the Administrator of the Estate of the Late William Lemaiyan Karasha) (Environment and Land Appeal E051 of 2022) [2024] KEELC 3438 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3438 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ENVIRONMENT AND LAND APPEAL E051 OF 2022

LC KOMINGOI, J

APRIL 25, 2024

BETWEEN

TABITHA WANJIKU MBURU ..... 1ST APPELLANT

ESTHER NYAMBURA MBURU ..... 2ND APPELLANT

PAUL KARIUKI ..... 3RD APPELLANT

AND

MARY NASHILU KARASHA (SUING IN HER CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE WILLIAM LEMAIYAN KARASHA) ..... RESPONDENT

(Being an Appeal from the Ruling and Orders of the Hon. P. Achieng, SPM in Ngong CM ELC Case No. 128 of 2018 delivered on 1st December 2022)

JUDGMENT

1. On the 1st December 2022, Honourable P. Achieng SPM, dismissed the Appellant's Preliminary Objection and granted the Respondents Notice of Motion dated 2nd August 2022 granting the Respondents leave to amend the Plaint.

2. The Appellant's aggrieved by the Ruling and Orders issued in CM ELC Case No. 128 of 2018 dated 1st December 2022 have moved this court through a Memorandum of Appeal dated 19th December 2022 and sought that the ruling be set aside with costs, and the Appellants Preliminary Objection dated 2nd August 2022 be allowed. The grounds are;

    1. The learned Magistrate erred in law and in fact by failing to consider in totality the appellants case and submissions and the applicable law before reaching his (sic) decision.

2. The learned Magistrate erred in law and in fact in proceeding on wrong principles and thereby arrived at a wrong decision.

3. The learned Magistrate erred in law and in fact in failing to properly and fully analyse the appellants and the Respondent's cases and therefore arrived at the wrong decision.

4. The learned Magistrate erred in law and misdirected himself (sic) by disallowing the preliminary objections on the ground that they were intended to defeat the Plaintiff's application for leave to amend the Plaint; a consideration which should not have been taken into account.

5. The learned Magistrate erred in law and misdirected himself (sic) in proceeding with the matter and issuing orders whereas the Respondent had no authority or locus standi to file the case and the instant application for leave and the court had no jurisdiction over the matter.

6. The learned Magistrate erred in law by failing to refer, to analyse and apply or otherwise distinguish the binding judicial precedents cited by the Appellants.

7. The learned Magistrate erred in law in unilaterally considering and allowing the Respondents application for leave to amend the Plaint before hearing the parties in the application.

8. The learned Magistrate erred in law and misdirected himself (sic) by allowing joinder or addition of a person into the matter as a second Plaintiff when the intended party had not consented to his joinder/addition as a Plaintiff into the case.

3. The Appeal was canvassed by way of written submissions.

The Appellants' Submissions

4. Counsel submitted that the trial court erred in allowing the Plaintiff's (Respondent in this Appeal) application for leave to amend the Plaint before hearing the Defendants' (Appellants in this appeal) notice of Preliminary Objection contrary to right to a fair hearing as guaranteed by article 50 of the *Constitution*. Counsel submitted that there being an objection on record, they anticipated that the Court would first determine the objection before addressing the application. As such, they only filed submissions concerning the objection and not the application. However, at the determination, the Court dismissed the Preliminary Objection and allowed the application, which was erroneous because the trial court did not give the parties an opportunity to put up their case on the application. Reference was made to the High Court case of *John Njoroge Gichora vs Gideon Numa* [2015] eKLR where the court held that, the application could not be determined on merit because the court had not been seized of it. Only the objection could be determined and if not allowed, then direct that the application be heard on merit. Counsel added that the lower court also dismissed the Preliminary Objection on the grounds that it was meant to undermine the application without considering the other grounds raised and submissions.

5. Counsel went on to submit that the lower court allowed a party to be enjoined in the suit without an application for the same contrary to Order 1 Rule 10(3) of the *Civil Procedure Rules* because no letter of consent for joinder from the intended Plaintiff was filed in court.

The Respondent's Submissions

6. Counsel for the Respondent submitted on the following issues for determination:

7. On whether the learned magistrate erred in disallowing the Appellant's Preliminary Objection, counsel submitted that the Preliminary Objection was filed in response to the Respondent's application to amend the Plaint. The Respondent's non joinder of her co-adminitratix was an inadvertent mistake which should not hinder access to justice as was held by the Court of Appeal in *Ham vs SOS* [2021] eKLR and Section 3A of the *Civil Procedure Act*.

8. On whether the Magistrate erred in allowing the Respondent's Application, counsel submitted that whereas the Appellants' submissions did not address the application, the court did not err in determining the application because an application seeking amendment ought to be disposed first since it is court's primary duty to sustain suits as much as possible rather than prematurely end them. This was the holding of Odunga J. (as he then was) in *Gladys Nduku Nthuki vs Letshego Kenya Ltd; Mueni Charles Mainge (Intended Plaintiff)* 2022 eKLR. Counsel added that Order 8 Rule 5 of the Civil Procedure Rules also granted courts and parties a right to amend their documents to correct an error. Submitting that an amendment should be freely allowed as long as it would not occasion an injustice to the other party as held in *Andrew Wabuyele Biketi vs Chinese Centre for the Promotion of Investment Development & Trade in Kenya Limited & 2 others* [2015] eKLR, *Bosire Ogero vs Royal Media Services* [2015] eKLR, and *Civicon Ltd vs Kivuwatt Ltd and 2 others* [2015] eKLR.

9. He prays that the Appeal be found to lack merit and ought to be dismissed with costs.

The Appellants' Further submissions

10. In a rejoinder, Counsel for the Appellants submitted that in the case *Gladys Nduku Nthuki vs Lethshego Kenya Ltd* [2022] eKLR submitted by the Respondent, the court heard the application and the preliminary objection contemporaneously which was different from this case where the trial court directed that only submissions on the preliminary objection be filed. Counsel also added that unlike in the Gladys Nduku case their application at the lower court did not seek to strike out the entire suit but only strike out the application for leave to amend.

11. Counsel also pointed out their objection being on a question of jurisdiction ought to have been addressed first citing *Suleiman Said Shabhal v Independent Electoral & Boundaries Commission & 3 others* [2014] eKLR. Adding that the said issue on jurisdiction was unchallenged and the entire suit was thus a nullity.

Analysis and Determination

12. I have considered the appeal, the grounds, the record of appeal, the rival submissions and the authorities cited. The issues for determination are:

    i. Whether the Learned Trial Magistrate erred in dismissing the Appellants' Preliminary Objection dated 6th August 2022 and allowing the Respondent's Application dated 2nd August 2022.

    ii. Whether the Appellant's are entitled to the orders sought.

    iii. Who should bear costs of the appeal?

13. This Appeal is on grounds that the lower court dismissed the Appellants' objection and allowed an application without parties being given an opportunity to hear. The Appellants claim that the ruling was therefore erroneous. The impugned ruling reads:

> I have considered the said preliminary objection and the submissions made. I note that the preliminary objection was filed on 18th August 2022, after the Plaintiff filed an application

dated 2nd August 2022 on 3rd August 2022. In the said application, the Plaintiff seeks leave to amend the plaint and include Erick Kurampe Karasha as the 2nd Plaintiff.

It appears that the Preliminary Objection was filed in order to defeat the said application by the plaintiff. Justice will not be served in allowing the preliminary objection. I therefore dismiss the said preliminary objection. I also proceed to allow the Plaintiffs application dated 2nd August 2022 in terms of prayer 2...

14. The Appellants Preliminary Objection filed on 18th August 2022 sought that: the suit and the application be dismissed or struck off on grounds that: the plaintiff had no capacity to institute and maintain suit or any application in court ... in absence and without authority or occurrence of her co-administrator Erick Kurampe Karasha; the plaintiff lacks locus standi, the suit is a nullity ab initio and the court has no jurisdiction over the matter.

15. The Respondent's application dated 2nd August 2022 sought leave of court to amend the plaint and include the co-administrator Erick Kurampe Karasha.

16. Did the Learned Trial magistrate err in dismissing the Preliminary Objection and allowing the application on grounds that a fair hearing was not accorded? I have perused the Record of Appeal and read the Appellants' submissions for the preliminary objection as well as the parties' submissions in this appeal.

17. The conflicting decisions surrounding the question of whether to permit the application to amend or to dismiss the suit altogether underscore the complexity of the issue at hand. However, it is abundantly clear that the interests of justice demand a resolution that avoids unnecessary prejudice to any party while facilitating the fair and efficient adjudication of the matter.

18. I note that the Appellants who are the Defendants in the suit before the lower court have a counterclaim. It would be in the interests of justice if the matter were to be heard to conclusion so that all the issues are resolved.

    Article 159 (a) of the Constitution implores courts not to dwell on technicalities but administer substantive justice.

19. Section 1A (1) of the *Civil Procedure Act* implores Courts to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes. Section 3A of the *Civil Procedure Act* grants Courts inherent power to make orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

20. The issue of amendment of pleadings and joinder of parties in a suit has also been stipulated in the Civil Procedure Rules as follows:

21. Order 1, rule 9 of the *Civil Procedure Rules*:

    9. No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

22. Order 1, rule 10 of the *Civil Procedure Rules:*

    (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and

that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

23. Order 8 Rule 3 (1) of the *Civil Procedure Rules*:

> Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

24. Order 8 Rule 5 (1) of the *Civil Procedure Rules*:

> For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

25. I am of the opinion that the above provisions emanate from the understanding that mistakes do occur. Since errors are inherent to the human condition, provision must be made for their rectification particularly within the context of legal proceedings, provided that such corrections do not unfairly prejudice the opposing party. By affording individuals the opportunity to correct errors, the legal framework promotes fairness and equity in the pursuit of justice. The Court of Appeal in *William Kiprono Towett & 1597 Others v Farmland Aviation Ltd & 2 Others* [2016] eKLR supported the above outlined provisions by holding that: "... Most critically Order 1 Rule 9 of the *Civil Procedure Rules* (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit..."

26. Additionally, the issue of errors has been acknowledged since time immemorial as pronounced by the Court of Appeal in *Belinda Murai & 9 others v Amos Wainaina* [1979] eKLR: "... The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate..."

27. In this instance, the non-joinder of the co-administrator is not an error warranting striking out of the entire suit. The Appellants' prayer to strike out the suit for non-joinder, would compel parties to initiate a fresh suit. This would not be in the interests of justice and expeditious disposal of cases. The intended amendment seeks to rectify an error in the pleading, a corrective action expressly permitted by law and essential to ensuring the fair presentation of the Plaintiff's case. Given the stage of the suit, I find that the lower court's rejection to the objection and granting leave to amend the Plaint to include the co-administrator would not unduly prejudice any party involved.

In the case of *Unga Limited Vs. Magina Ltd* (2014) eKLR it was held;

> " This court is now enjoined to do substantial justice to the parties; it must disregard technical procedures and aim at settling the root of the dispute. That is the spirit and the letter of Article 159 of the *Constitution* as read together with Section 1A and 1B of the *Civil Procedure Act*. This overriding principle is a guiding beacon for the court. The principle aims of the overriding objective includes the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing."

28. I therefore dismiss this Appeal and uphold the trial court's ruling and orders dated 1st December 2022. Each party do bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 25TH DAY OF APRIL 2024.

L. KOMINGOI

JUDGE.

In the presence of

N/A for the Appellants.

N/A for the Respondent.

Court Assistant - Mutisya