Mwasi & another v Asikoye (Civil Appeal 27 of 2017)
[2021] KECA 289 (KLR) (3 December 2021) (Judgment)

Neutral citation: [2021] KECA 289 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 27 OF 2017

PO KIAGE, K M'INOTI & M NGUGI, JJA

DECEMBER 3, 2021

BETWEEN

ALBERT ABIAYO MWASI ..... 1ST APPELLANT

SAMUEL NGAMBWA OPIAYO ..... 2ND APPELLANT

AND

OKOKO ASIKOYE ..... RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Kisumu (Majanja, J.) dated 4th August 2016 in H.C.C.C. NO. 189 OF 1988)

JUDGMENT

1. The dispute in this appeal dates back some thirty three years ago. In 1988 the 1st appellant, Albert Abiayo Mwasi, filed a suit in the High Court at Kisumu against the respondent, Okoko Asikoye, claiming ownership of the parcel of land known as West/Bunyore/194 (the suit property). On 5th April 1989, the High Court, with the consent of the parties, referred the dispute to arbitration by the District Officer, Emuhaya Division, sitting with a panel of elders. The arbitral tribunal made an award in favour of the respondent, which was subsequently adopted as an order of the court.

2. The appellant was aggrieved by the award and applied to set it aside. His application was dismissed vide a ruling dated 5th February 1991. Subsequently, by an order dated 12th October 1992, the High Court (Khamoni, J.) directed the appellant to vacate the suit premises within three months, failing which he was to be evicted. It is not clear from the record what the appellant was doing for a whole 24 years, but on 4th June 2016, he applied to the High Court for stay of execution and an order to set aside the orders of eviction issued on 12th October 1992.

3. In dismissing the application, the High Court (Majanja, J.) expressed himself as follows:

> "Looking at the matter, I must say that this is a case where litigation must come to an end. For 24 years to elapse before seeking a stay is an inordinately long time and indeed prejudicial to the other party. Whatever the reasons, the plaintiff (appellant) knew there was an order against him and that he was expected to vacate the suit land. He cannot wake up 24 years (later) to seek a stay pending setting aside of orders of eviction. As regards the aspect of setting aside, the only issue that the applicant has raised is one of eviction. He claims he was not given notice of eviction. He does not dispute the matter is finalised. He must be told in no (uncertain) terms that he must leave the land."

4. The next twist in the dispute was an application dated 2nd August 2016 by the 2nd appellant, Samuel Ngabwa Opiayo, to be made a party to the suit. Instructively the application was made by the advocate who was on record for the 1st appellant. The contention this time round was that in making the order for eviction of the 1st appellant, the High Court (Khamoni, J.) stated that the suit property was to be shared between the respondent and one Samuel Indimuli. Since the said Samuel Indimuli was deceased, it was necessary to make the 2nd appellant, his nephew and personal representative, a party to the suit.

5. Again the High Court was not persuaded of the merit of the application, and dismissed the same on 4th August 2016, provoking this appeal. The learned judge considered that the dispute over the suit property was always between the 1st appellant and the respondent, that the 1st appellant's case throughout was that he was the owner of the suit property, that the litigation between the 1st appellant and the respondent took place during the lifetime of Samuel Indimuli, who died on 5th July 1998 without him ever intervening or seeking to be joined in the suit, and lastly, that Samuel Indimuli's claim, if any, was a different and independent claim from that of the 1st respondent, who was found to be a trespasser. Accordingly, there was no basis for making the 2nd respondent a party in the suit.

6. The appeal was heard through written submissions. The appellants relied on their written submission which they did not wish to highlight, whilst the respondent, although duly served with the hearing notice, neither filed written submissions nor appeared for the hearing.

7. In support of the appeal, Mr. Athunga, learned counsel for the appellants, contended in his written submissions that the High Court had no jurisdiction to hear and determine the application to make the 2nd respondent a party to the suit and that the same ought to have been heard and determined by the Land and Environment Court. He added that a decision by a court bereft of jurisdiction is null and void.

8. Next, learned counsel submitted that the decree in issue could not be enforced because it had expired. He contended that under the Limitations of Actions Act, no claim could be brought after expiry of 12 years.

9. On the third ground of appeal the appellants contended that the High Court erred by issuing orders without the decree or the arbitral tribunal's award on record. He added that the High Court could not evict Samuel Indimuli from his portion of the suit property.

10. Lastly the appellants contended that the High Court erred by issuing substantive orders on a date when the matter before it was listed for mention. For all the above reasons the appellants urged us to allow the appeal with costs and set aside the eviction orders.

11. We shall consider the grounds of appeal in the order in which the appellants presented them. The first is the issue of jurisdiction, the contention being that since the application in question related to a parcel of land, it ought to have been heard and determined by the Environment and Land Court rather than

by the High Court. It is not in dispute that by dint of the express provision of Article 165 (5) of the *Constitution*, the High Court does not have jurisdiction in matters reserved for the Environment and Land Court or the Employment and Labour Relations Court. It is equally undisputed that an issue of jurisdiction may be raised in this Court, even for the very first time. (See *Attorney General & 2 others v. Okiya Omtata Okoiti & 14 others [2020] eKLR*).

12. It is worth remembering, however, as we have already pointed out, that the dispute in this appeal started way back in 1988 and was filed in the High Court long before the establishment of the Environment and Land Court by the Constitution of Kenya, 2010. By the time the Employment and Land Court was created, the substantive dispute had already been heard and determined by the High Court. The award of the arbitral tribunal was adopted as an order of the High Court on 11th July 1991. The order of eviction of the 1st appellant from the suit property was made on 12th October 1992. By the time the Environment and Land Court came into being, the substantive dispute had already been heard and determined by the High Court.

13. It is also instructive that all the collateral applications in question were filed by the applicants themselves in the High Court. Further, the record shows that on 21st June 2016, Kibunja, J. made an order that since there was no Environment and Land Court before 2012, the applications in the matter would be handled by the High Court. There is no evidence of an appeal on record against that order.

14. Having carefully considered the circumstances of this appeal and in particular the fact that the substantive dispute had already been heard and determined by the High Court long before the establishment of the Environment and Land Court, we are not persuaded by the appellant's argument that the High Court had no jurisdiction in the matter. Accordingly, we do not find any merit in this aground of appeal.

15. The second ground of appeal relates to whether the decree of eviction is time barred. With respect, we have a fundamental problem appreciating the relevance of this ground in this appeal. The appellants' notice of appeal dated 12th August 2016 is against the ruling and order of the High Court at Kisumu dated 4th August 2016. That ruling determined and dismissed only the 2nd appellant's application to be joined in the suit. It did not, and could not, validly address the issue of eviction of any party or the validity of the eviction decree. In our view, there is no basis in this appeal for raising the issue of limitation of time as related to the decree of eviction because the High Court neither addressed nor decided the issue.

16. Turning to the third ground of appeal, the appellants' complaint is that the decree or award of the arbitral tribunal is not on record. Again with respect, we are satisfied that this ground is a mere red herring. Neither the appellants nor the respondent dispute that the arbitral tribunal ruled against the 1st appellant and that the decision of the arbitral tribunal was adopted as an order of the court. It is on the basis of these undisputed facts that the High Court issued an order of eviction against the 1st appellant, which he has been trying to set aside. The record itself is clear that the award of the arbitral tribunal was read by the court to the parties on 2nd January 1990, and that it was adopted as an order of the court on 11th July 1991. No party has demonstrated any prejudice that it has suffered because of lack of the decree or award on record. What the appellants are raising are clearly undue technicalities which Article 159 of the Constitution demands must not shackle the courts.

17. Regarding the contention that the High Court cannot evict Samuel Indimuli from his portion of the suit property, again we do not see how this issue can ever arise from the ruling, the subject of this appeal. The High Court merely dismissed, and properly so in our view, the application by the 2nd respondent to be made a party to the long concluded suit. It did not address, and could not have addressed, the

issue of the alleged eviction, given the tenor and thrust of the application. This ground of appeal too has absolutely no merit.

18. The last issue is whether the learned judge erred by making substantive orders during mention of the matter. This Court has stated time and again that a court should not hear and determine a matter on a date that is set for mention (See. Mrs. Rahab Wanjiru Evans v. Esso Kenya Ltd, CA *No.13 of 1995, Barclays Bank of Kenya Ltd & Another v. Gladys* Muthoni & 20 Others [2018] eKLR and *Rift Valley Water Services Board v Oriental Construction Co. Ltd [2018] eKLR).*

19. The record in this case, however, does not bear out the appellant's contention. The record shows that the application to join the 2nd appellant to the suit was filed on 2nd August 2016 and the parties appeared before the learned judge on 4th August 2016. Nothing shows that the matter was before the judge for mention. Counsel for the 2nd appellant urged the application, contending that Khamoni J. had recognised Samuel Indimuli as a part owner of the suit property and therefore his personal representative, the 2nd appellant, should be joined in the suit. For his part the respondent opposed the application, contending that the suit was already finalised a long time ago, indicating that he had applied for eviction of the 1st appellant from the suit property. Thereafter the learned judge delivered the considered ruling that we have set out above.

20. From the foregoing, we find that none of the ground of appeal advanced by the appellants has any merit. The entire appeal is accordingly dismissed with costs to the respondent. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 3RD DAY OF DECEMBER 2021.

P. O. KIAGE

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

MUMBI NGUGI

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR