



**Ladha v Essak & another (Environment and Land Appeal
E011 of 2023) [2024] KEELC 3351 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3351 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E011 OF 2023**

NA MATHEKA, J

APRIL 24, 2024

BETWEEN

SHEMAZ HUSSEIN HAJI LADHA APPELLANT

AND

SALIM HAJI ESSAK 1ST RESPONDENT

BILQIS SALIM SULEIMAN 2ND RESPONDENT

JUDGMENT

1 The Appellant herein being aggrieved by the Ruling of the Honourable David Mburu delivered on 23rd February 2023 in Environment and Land Case No. 956 of 2020 hereby appeals to his Honourable Court on the following grounds inter alia;

1. That the learned Magistrate erred in Law and in fact by finding that there was proper service to the Appellant.
2. That the learned Magistrate erred in Law and fact by finding that the judgment delivered on 13th November 2020 was a regular judgment.
3. That the learned Magistrate erred in Law and fact by failing to evaluate all the evidence on record hence arrived at a wrong conclusion.
4. That the learned Magistrate erred in Law and fact by failing to consider the existence of Mombasa ELC NO. 282 of 2008 between the same parties wherein the Plaintiffs were sued as the 4th and 5th Defendants and that judgment was delivered in favour of the Appellant on 3rd June 2021.

The Appellant prays that;

1. The Appeal be allowed.



2. Ruling of Honourable David Mburu delivered on 23rd February 2023 be set aside.
3. Costs of the Appeal.
4. Any other relief deemed fit to grant by this Honourable Court.

- 2 This court has considered the appeal and submissions therein. The respondents instituted CMCC No. 956 of 2020 against the appellant and sought inter alia for orders for the appellant to vacate Plot No. Mombasa/Block XXII/155. On 18th September 2020 the respondents filed a Request for Interlocutory Judgement against the appellant for failure to enter appearance within the stipulated time. The request for judgment was accompanied by an affidavit of service sworn by Michael M. William, who deponed that he had effected service to the appellant of copies of the plaint, verifying affidavit, witness statement, list of documents and summons dated 26th August 2020. The court proceeded to enter judgment on 13th November 2020 against the appellant as prayed in the plaint.
- 3 The appellant being dissatisfied with the said judgement and in order to stop the eviction that was conducted on 11th November 2022, the appellant filed an application dated 14th November 2022 seeking to stay the said judgement and for leave to defend the suit. The application was heard and determined by the learned magistrate, who found that the appellant was properly served and failed to enter appearance and that the interlocutory judgement entered was regular. Further, the learned magistrate found that the appellant did not attach any draft defence to the application that would have warranted the court to find that there was a good defence capable of being heard on merit. The learned magistrate dismissed the application with costs to the respondents. The appellant being dissatisfied with the said ruling has appealed before this court and has prayed for the same to be set aside.
- 4 The appellant together with Khairrunissa Hussein Haji Ladha instituted by way of Originating Summons dated 4th July 2008, Mombasa ELC 282 of 2008 against Suleiman Abdulrehman, Nizar Ali Mohammed, Mohamend Khalid Ismail, Salim Haji Essak, Bilgis Salim Suleiman. In that case, the appellant together with Khairrunissa sought to be entitled to Plot No. Mombasa/Block XII/155 by way of adverse possession. On 3rd June 2021, this court found the appellant's Originating Summons merited and allowed it, the court found that the appellant together with Khairrunissa were entitled to and ought to be registered as the proprietors of Plot No. Mombasa/Block XII/155 by virtue of adverse possession. The respondents therein (who included the respondents herein) were dissatisfied with the said judgement and sought to appeal against it. They brought an application dated 5th July 2021 before this court seeking a stay of execution of the judgement delivered on 3rd June 2021 pending the hearing and determination of the intended appeal. On 18th November 2021, the court found the application unmerited and dismissed it with costs. However, the court directed that the Land Registrar Mombasa do register an inhibition against the title within 30 days from the date of the said ruling at the cost of the defendants therein.
- 5 From the evidence before this court, it is obvious that the appellant and respondents are related and have litigated before this court in Mombasa ELC No. 282 of 2008 over Mombasa/Block XXII/155. The court has pronounced itself on it through its judgement delivered on 3rd June 2021. The decision of the respondents to file a suit at the Mombasa Magistrate's Court while litigating before this court as respondents was not only forum shopping but an abuse of the court process. The respondents who are the plaintiffs in the lower court failed to inform the subordinate court of the pending case before the superior court for obvious reasons, they were seeking eviction orders against the appellant.
- 6 The respondents cannot be allowed to forum shop, it is an abuse of the court process. 890The parties herein have already litigated over the suit property and this court has pronounced itself and delivered



judgment. In their application dated 5th July 2021 in ELC 282 of 2008, the respondents annexed a Notice of Appeal to the Appellant Court dated appeal merited and I allow the same with costs to the Appellant.

7 It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF APRIL 2024.

N.A. MATHEKA

JUDGE

