



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 266 OF 2014

IN THE MATTER OF ARTICLES 19, 20, 21, 22, 23, 25, 27, 29, 39, 40, 47, 48, 67 (e) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 40, 47, 48, 61 (1) and 67 (e) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 8 OF THE LAND ACQUISITION ACT CAP 295

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION SECTION 5 (1) (e) (f) and 6 ACT NO. 5 OF 2012

AND

IN THE MATTER OF RULE 10 AND 11 OF THE CONSTITUTION OF KENYA (PROTECTION AND FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) PRACTICE AND PROCEDURE RULES 2006 READ TOGETHER WITH RULE 19 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA 2010

**VINCENT BARASA KHAYONI 1ST
APPELLANT**

**CHARLES BARASA WASIKE 2ND
APPELLANT**

**CONCESITA KHAYUMBI WASIKE 3RD
APPELLANT**

**ISAAC SIMIYU MUREFU 4TH
APPELLANT**

(An Appeal from the decision and decree/order of the High Court of Kenya at Bungoma, (A. Omollo, J.) dated 26th day of June, 2014

in

PETITION NO. 5 OF 2013

JUDGMENT OF THE COURT

1. The appellants are aggrieved by, and have appealed against an order issued by the High Court at Bungoma (A, Omollo, J.) on 26th June 2014 striking out their petition dated 31st May 2013 on the basis that they did not have “any witness to testify” on their behalf. In that petition, the appellants sought an order, amongst other reliefs, to restrain the respondents from evicting the appellants from a property known as Title Number West Bukusu/South Mateka/970, which they claim they lawfully occupy, and which according to them, is wrongly registered in the name of the 1st and 2nd respondents.

Background

2. The relevant background to this appeal, in brief, is that the hearing of the appellants’ petition was scheduled before the learned Judge on 26th June 2014. The appellants’ advocate applied for adjournment on the basis that appellants’ witness, one Mr. Makhanu, was not available as he was “involved in a meeting.”

3. The advocates for the respondents opposed the application for adjournment on the grounds that it was not made in good faith; that there had been previous adjournments granted at the instance of the appellants; and that the witness intended to be called was “not a petitioner.”

4. The Judge was not satisfied that sufficient grounds were established and declined to grant an adjournment. The court however granted the appellants “till noon to prosecute their case.”

5. The record shows that at 2.20 pm on the same date, the appellants’ advocate presented one of the appellants, Calistus Kundu Murefu, the 8th petitioner, as a witness intending to testify in support of the petition. The advocates for the respondents objected to that witness on the basis that Calistus Kundu Murefu had not sworn any affidavit or statement upon which his testimony was to be based.

6. Upholding that objection, the court was of the view that to allow Calistus Kundu Murefu to testify in those circumstances would result in the respondents being “ambushed with evidence that they have not had opportunity to discuss with their client and which goes against the right to a fair hearing.” The Judge then stated that for Calistus Kundu Murefu to testify, “he must first record a statement or swear an affidavit to be allowed to give any evidence.” Taking queue from that statement, the advocate for the appellants then sought leave, which was opposed by the advocates for the respondents, “to put in an affidavit or a statement guided by the ruling of the court.”

7. The Judge was not impressed. In the Judge’s view, the advocate for the appellants was thereby “seeking an adjournment through the back door”...whose result would amount to reviewing orders refusing adjournment. The court concluded that “the court still maintains its position in refusing the adjournment and in the absence of any witness to testify for the petitioner, this petition be and is hereby struck out for non-attendance of witness.”

The appeal and submissions by counsel

8. Appearing before us, learned counsel for the appellants, Mr. O. Bw’onchiri, referred to the grounds of appeal contained in the memorandum of appeal and submitted that the Judge fell into error in striking out

the petition; that the affidavit in support of the petition sworn by Vincent Barasa Khayoni, was sworn on behalf of, and with the authority of all the petitioners; that Calistus Kundu Murefu who would have testified on behalf of the appellants would have based his testimony on that affidavit, and no prejudice would have been suffered by the respondents; that it was erroneous for the Judge to strike out the petition on the basis that there were no witnesses when in fact Calistus Kundu Murefu, a petitioner in his own right, was in court.

9. Opposing the appeal, learned counsel for the 1st and 4th respondents, Miss D. Wakoli, and for the 3rd respondent, Mr. G. Murunga, and Mr. Kuria for the 5th to 8th respondents, submitted that the Judge cannot be faulted for striking out the petition; that by seeking the adjournment, the appellants were seeking to prolong the life of interim injunctive orders that were prejudicial to the respondents; that there was a history of adjournments granted at the instance of the appellants; that only the 1st appellant, Vincent Barasa Khayoni, to whom all other petitioners had donated authority could have testified on the appellants behalf; that Calistus Kundu Murefu could not in those circumstances testify for the appellants as the respondents would not have been able to cross examine him.

Determination

10. We have considered the appeal and the submissions by counsel. Calistus Kundu Murefu, whom counsel for the appellants intended to call as a witness, on behalf of the appellants, was undoubtedly a party to the petition as the 8th petitioner. The Judge was right that for purposes of fair hearing, he should have recorded a statement or sworn an affidavit on the basis of which he was to testify and to give the respondents an opportunity to prepare to cross examine him if they so wished.

11. There was however no indication that such affidavit or statement would be materially different from that sworn on behalf of all the petitioners by the 1st petitioner, Vincent Barasa Khayoni, and that the granting of an opportunity to Calistus Kundu Murefu to swear an affidavit, possibly adopting the contents of the affidavit already on record, would have occasioned the respondents prejudice.

12. There is no reason why such an affidavit would not have been filed without delay. Although it was entirely in the discretion of the Judge to grant or refuse an adjournment, the drastic order to strike out the petition was, in those circumstances, erroneous in our view. We accordingly allow the appeal, set aside the order of the court given on 26th June 2014 and substitute therewith an order reinstating the petition for hearing before any Judge other than A. Omollo, J.

13. The appellants shall have the costs of the appeal.

Orders accordingly.

Dated and delivered at Eldoret this 16th day of February, 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

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DEPUTY REGISTRAR