



Kidiya & another v Kirigu & another (Sued as Trustees of Pentecostal Assemblies of God (PAG) Kenya) & another (Environment and Land Appeal 12 of 2023) [2024] KEELC 4989 (KLR) (27 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4989 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL 12 OF 2023**

E ASATI, J

JUNE 27, 2024

BETWEEN

JOSEPH OBONDO KIDIYA 1ST APPELLANT

PETER ZING'ANG'A BANDI 2ND APPELLANT

AND

**REV STEPHEN NJOROGE KIRIGU, REV JAMES ONDIEKI OGENDI
(SUED AS TRUSTEES OF PENTECOSTAL ASSEMBLIES OF GOD (PAG)
KENYA) 1ST RESPONDENT**

PASTOR SHEM MAYODI LIVOI 2ND RESPONDENT

*(An appeal from the ruling and order of the Principal Magistrate at
Vihiga Hon. R. Ndombi, dated 15th day of November 2023 in Vihiga
ELC MISC. Application No. E009 of 2023 at Vihiga Law Courts)*

JUDGMENT

Background

1. The appellants filed VIHIGA PMC MISC. APPLICATION NO. E009 OF 2023 vide an undated Notice of Motion filed in court on 10th August 2023. The Notice of Motion was stated to be brought pursuant to the provisions of Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules (Rev 2020), Order 51 Rules 1, 3, 4, 5, 7 and 10(2) of the Civil Procedure Rules and sections 1 and 3A of the [Civil Procedure Act](#).
2. The application sought for orders that:-
 - i. The application be certified urgent and the same be directed to be heard inter partes on a date to be fixed by the court



- ii. The court be pleased to issue a temporary order of injunction restraining the Respondents either by themselves or servants, agents, employees and/or representatives from continuing to occupy or trespassing, entering, erecting any structures thereon or in any other manner whatsoever from interfering with the applicants' legal occupation or use of land parcel NO. SOUTH MARAGOLI/BUYONGA/1697.
 - iii. The honourable court be pleased to issue a mandatory injunction against the Respondents to demolish the illegal structures on the suit property.
 - iv. The Respondents, either by themselves or their servants, agents, employees and/or representatives be and are hereby ordered to vacate the said parcel of land NO. SOUTH MARAGOLI/BUYONGA/1697.
 - v. The honourable court be at liberty to grant the 1st and 2nd applicants any other or further orders as it may deem just and expedient to grant in the circumstances.
 - vi. The OCS Vihiga Police Station, through the Deputy County Commander be notified and ensure protection and compliance.
 - vii. The costs of this application be provided for.
3. The grounds upon which the application was brought before the trial court were that a suit filed by the Respondents had been struck out for lack of jurisdiction, that subsequently, the Respondents were given notice to vacate land parcel No. SOUTH MARAGOLI/BUYONGA/1697 and hand it over to its legal owners namely ADONAI SELF HELP GROUP of which the 1st and 2nd Respondents refused to comply. That the Respondents are in contempt of court and that it is in the interest of justice that the orders sought be granted.
 4. The record of appeal shows that in response to the application, the Respondents opposed the application vide the contents of the Replying Affidavit sworn by the 2nd Respondent on 21st August 2023.
 5. The record further shows that the application was heard by the trial court by way of written submissions and vide its ruling dated 15th November 2023 (herein referred to as the Ruling), the trial court found that the application was not merited and dismissed it with no order as to costs.
 6. Aggrieved by the ruling, the appellants filed the present appeal vide the Memorandum of Appeal dated 29th November 2023 seeking for orders that the appeal be allowed, the Honourable court do hold and order that the appellants established that they were entitled to the orders prayed for in the application dated 10th August 2023 and that the appellants be granted the costs of the appeal.
 7. The grounds of appeal as contained in the Memorandum of Appeal are that: -
 - i. the learned Principal Magistrate erred in law and in fact in holding that there was a dispute in the ownership of land parcel No. South Maragoli/Buyonga/1697 between the parties when the same had been settled by the Family Court in Kitale during the Summons for Rectification of the Grant in Kitale Succession cause No. 227 of 2014 on 23rd day of September 2019.
 - ii. the learned Principal Magistrate erred in law and in fact in failing to recognize that the appellants had since the grant of Summons for Rectification of Grant on the 23rd day of September 2019, been issued with an absolute title of land reference No. SOUTH MARAGOLI/BUYONGA/1697 on the 18th day of February 2020 and therefore had the right to go to her honourable court as an Environment and Land Court to seek orders of eviction



of the Respondents as it did in this case as clearly the said parcel of land fell within its area of jurisdiction.

- iii. the learned trial Magistrate erred in law and fact to hold that since this honourable court had on an appeal against her earlier ruling held that her court did not have jurisdiction to question the findings of the Family court in Kitale on the ownership of the parcel of land, that the parties were wrong to seek orders from her in the manner they did.
- iv. That the learned Principal Magistrate erred in law and in fact when he dismissed the appellants' application for the eviction of the Respondents from the said parcel of land on the grounds that it was not merited when there was clear evidence that the appellants were entitled to exclusive and full occupation and use of the land as they have in their possession an absolute title to the said parcel of land.

Submissions

8. The appeal was argued by way of written submissions. Written submissions dated 21st February 2024 were filed on behalf of the appellants by T. T. M. Aswani Advocate for the appellants. Relying on the case of *Waas Enterprises Limited vs city Council of Nairobi & another* [2014] eKLR where it was held that as a registered proprietor, the plaintiff was entitled to enjoy all proprietary rights to the exclusion of all others and also the provisions of sections 24 and 25 of the [Land Registration Act](#), Counsel submitted that the applicants must be allowed to enjoy all the rights and privileges appurtenant to the suit land.
9. Counsel submitted further that there was no evidence placed before the trial court that the Respondents had either sought a review of the decision dated 19th September 2019 in the Probate and Administration court at Kitale or had they taken the matter to the Court of Appeal. That the trial court had jurisdiction and should have exercised it to resolve the dispute.
10. Written submissions dated 20th March 2024 were filed on behalf of the 1st Respondent by the firm of Ben Oduol Nyanga Advocates. Counsel submitted that as held in *Butt vs Khan* (1997) 1 KLR, in order for an appellate court to interfere with the decision appealed against, it must be shown that the trial court proceeded on wrong principles or that the Magistrate misapprehended the evidence in some material respect. Counsel also relied on the case of *Peter M. Kariuki vs Attorney General* (2014)eKLR where it was held that an appellate court handling a first appeal is duty bound to reconsider the evidence before the trial court before arriving at its independent conclusion.
11. On indefeasibility of title, Counsel relied on the provisions of section 26 of the [Land Registration Act](#) and submitted that although title is enviously guarded by the law, the indefeasibility of a title as evidence of proprietorship can be challenged where it is evident that the title could have been acquired un-procedurally and through fraud or misrepresentation to which the proprietor is a party. Counsel relied on the case of [Elijah Makeri Nyangwara vs Stephen mungai Njuguna & another Eldoret ELC Case No 609 of 2012](#) to demonstrate the point.
12. Counsel submitted that there was evidence that the appellants used their leadership positions in the church to unlawfully transfer the land to themselves yet the land had been purchased by the church. That the Respondents were not aware of any notice or court order being served upon them for eviction and the proceedings for eviction on the basis of the letter infringed on their right to property as it is the church that funded the purchase of land parcel No. SOUTH MARAGOLI/BUYONGA/1697. That the applicants are relying on a bad title that was acquired through misrepresentation, illegality, un-procedurally and through a corrupt scheme.



13. It was submitted further that without consultation with the church, the 1st Respondent went ahead to cause the certificate of grant in Succession Cause No. 227 of 2014 in the High Court at Kitale to be rectified in their names instead of the Respondents who were holding the subject parcel of land in trust for the church. Counsel prayed that the appeal be dismissed with costs.

Issues for determination

14. From the grounds of appeal, the submissions made and the entire record of appeal, the following are the issues that emerge for determination: -
- i. whether or not the trial Magistrate erred in holding that there was a dispute on the ownership of land parcel No. SOUTH MARAGOLI/BUYONGA/1697.
 - ii. whether or not the trial court erred in holding that it had no jurisdiction to entertain the matter before it.
 - iii. whether or not the trial court erred in dismissing the application before it.
 - iv. whether or not the appeal has merit.
 - v. who pays the costs of the appeal?

Analysis and determination

15. This being a first appeal, the court reminds itself of the duty to re-examine and analyze the evidence placed before the trial court with a view to arrive at its own independent conclusion. See section 78 of the *Civil Procedure Act* and *Selle & another vs Associated Motor Boat Company Ltd & Another (1968) IEA 123* where it was held that a court handling a first appeal is not necessarily bound to accept the findings of fact and law by the court below but has a duty to re-examine the evidence placed before the trial court.
16. The first issue for determination is whether or not the trial court erred in holding that there was a dispute over ownership of the suit land. The record of appeal shows that the trial court in its ruling dated 15th November 2023 held that
- “any eviction order has far reaching implications as it entails forceful removal of a party from land they have been in occupation of. Therefore, the court must satisfy its merits where there is a disputed ownership like in this case in my view. Section 152 of the *Land Act* appears to contemplate a formal suit would be advised.”
17. The appellants’ position is that the issue of ownership of LR NO. SOUTH MARAGOLI/BUYONGA/1697 was not disputed as the appellants have an absolute title to the parcel of land as a result of the order of the Probate and Administration court in Kitale dated 19th September 2019 and this court’s order.
18. The record shows that the appellants hold title which it obtained through succession Cause. It is also true that vide a judgement of this court, a suit filed by the Respondents in the lower court was struck out for want of jurisdiction. However, from all these proceedings, it emerges that there is a dispute on ownership of the suit land. The court did find in the appeal judgement that the Respondents have recourse to the succession matter either by way of review or appeal.
19. Regarding the case before the lower court, the record shows that it concerned ownership of the suit land. The same was struck out for want of jurisdiction. In the miscellaneous application the subject of



this appeal, the Respondent's position was that the title held by the appellants was obtained by fraud. Clearly a dispute exists on ownership of the suit land and the trial court was right to so hold.

20. The second issue for determination is whether or not the trial court erred in holding that it had no jurisdiction to entertain the matter before it. It was submitted on behalf of the appellants that the trial court should not have confused the lack of jurisdiction that was referred to by this court in ELC APPEAL NO E003 OF 2022 as the Respondents were trying to bring up an issue that had been decided by the probate and administration court in Kitale. That there was no evidence that the Respondents had either sought a review of the decision dated 19/9/2019 in the Probate and Administration court at Kitale or taken the matter to the Court of Appeal. That in the circumstances, the appellants had every right to litigate the dispute in regard to the interference with their exclusive possession of the suit land. That the court had jurisdiction and should have exercised the same to resolve the dispute. That this court should step in and deal with the unresolved issues between the parties.
21. A reading of the ruling reveals that although the court made an observation regarding its jurisdiction, it proceeded to analyse and determine the application on merits. It considered that there was no order from the High Court at Kitale capable of execution vide the Miscellaneous application. The court found that the application was not merited and dismissed it. I find that the trial court exercised its jurisdiction and handled the application.
22. The third issue for determination is whether or not the trial court erred in dismissing the application. The record shows that the trial court observed that as the orders sought had far reaching implications as they entailed forceful removal from land it had been in occupation of, a formal suit would be advised. The general rule is that suits ought to be instituted by plaint. Section 19 of the *Civil procedure Act* provides that "every suit shall be instituted in such manner as may be prescribed by the rules." The rules in Order 3 Rule 1 Civil Procedure Rules provide that "every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed."
23. It is evident from the proceedings in the subordinate court that the substantive prayer sought by the appellants was an order of mandatory injunction compelling the Respondents to demolish the structures on the suit property and vacate. In essence, the appellants were seeking for eviction orders against the Respondents. One of the grounds for the application was the judgement of this court in Vihiga ELC Appeal No. E003 of 2022. The said judgement addressed the issue of jurisdiction. There is no explanation why the appellants did not file a substantive suit seeking the eviction of the Respondents so as to afford the Respondents an opportunity to defend the same. The appellants ought to have approached the court as prescribed by the rules. A miscellaneous application is applicable where there is no procedure expressly provided by the rules. See *Joseph Kibowen Chemjor vs William C. Kisera* [2013] eKLR. In *Tatecoh Housing and Co-op Sacco Ltd vs Qwetu Sacco Ltd* [2021]eKLR the court held that

"without much ado, I agree with the position of the Respondents...that the appellant cannot seek the orders sought in the Miscellaneous application without going through the process of filing suit. It will be observed among the other orders sought are orders of eviction. One will ordinarily only obtain an order of eviction after a full hearing of the case. What the appellants needed to do was therefore to file a substantive suit for eviction through a plaint. It is upon the hearing of such suit and if successful that an order of eviction would issue."



24. Similarly, in *Norah Ndunge Henry & another vs Abednego Mutisya & another*[2022]eKLR the court held that

“ a Notice of Motion is not legally recognized as an originating process. A Notice of Motion can only be within a properly instituted suit.”

25. There is no evidence that there had been compliance with the provisions of the *Land Act* on eviction of unlawful occupants of private land. I find that the trial court was right in dismissing the application before it.

26. Having found that the trial court rightfully found that there exists a dispute on ownership of the suit land, that the trial court did not dismiss the application for lack of jurisdiction but on merit after analysing it, and that the trial court did not err in dismissing the miscellaneous application, this court finds no reason to interfere with the decision of the trial court and further finds that the appeal herein is not merited.

27. On costs, the law as contained in section 27 of the *Civil Procedure Act* is that costs follow the event.

28. The upshot is that the appeal is therefore hereby dismissed. Costs to the Respondents.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED THIS 27TH DAY OF JUNE, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Ajevi: Court Assistant.

T. T. M Aswani Advocate for the Appellants.

No appearance for the Respondents.

