Dzuya v Mwakombo & another (Environment and Land Appeal 27 of 2023) [2024] KEELC 5657 (KLR) (31 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5657 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT AND LAND APPEAL 27 OF 2023

FM NJOROGE, J

JULY 31, 2024

BETWEEN

GEORGE KAVU DZUYA .... APPELLANT

AND

SERA MWAKOMBO .... 1ST RESPONDENT

JAMES MWAKOMBO .... 2ND RESPONDENT

(Being an appeal from the Ruling and or Order of the Hon. Nelly Chepchirchir, PM, in Mariakani ELC Case No. 33 of 2019- George Kavu Dzuya v James Mwakombo & Ano, dated 6th June, 2023)

JUDGMENT

BACKGROUND

1. The background to the consolidated appeals is as follows: by a plaint dated 19/12/2019 the appellant George Kavu Dzuya sued the respondents, claiming ownership of land Parcel No 1043/III/150 on which he allegedly he has built a building which he has let out to tenants. He claimed trespass against the respondents who allegedly encroached on the suit property in 2015 and began some developments thereon. Upon his complaint to the local administration some intervention caused the respondents to cease development activities on the suit plot but they have declined or neglected to demolish the structure that they erected thereon. The appellant then obtained permission from the relevant authorities and sought the services of a registered surveyor who did a survey of the suit land and confirmed vide a formal report dated 28/7/2016 that the respondents' structure was built partly on the suit plot and partly on Plot No 1043/III/151, but even after that confirmation and despite requests by the appellant, the respondents have declined to remove the structure. In 2019 the respondents sought to extend their structure. The appellant sought the following orders against the respondents:

a. An order compelling the respondents to hand over vacant possession of the portion of the suit plot they have encroached on;

b. Alternatively, the court bailiff to evict the respondents and their agents from the suit plot and give the appellant vacant possession;

c. That the OCS Rabai Police Station or any other station do provide security during the eviction;

d. A permanent injunction restraining the defendants and their agents from further trespass upon the suit plot.

e. Costs of the suit and interest at court rates.

2. The 1st respondent filed a defence on 12/7/2019 denying the claim and stating that there is no privity of contract between them and the appellant. An objection based on the *Law of Contract Act*, which did not specify details, was also raised. The 1st respondent further stated that the suit property is now under administration by the Public Trustee in Succession Cause No 82 of 1978 and that the person named as the 2nd respondent was deceased since 1/1/2020 and thus lacks legal capacity to be joined in the suit. Further the respondents claimed that they have been in occupation of the land since the 1950s when the 2nd respondent (now deceased) and her late husband built a building on what they called family land, and which, according to them had been passed down from their grandmother. They averred that it is the appellant who is now attempting to grab the land and that the appellant has failed to establish how his right to title over the land was created. They averred that they being beneficiaries of their predecessors' estate, their occupation and title to the land can only be challenged in a succession court case. They also alleged that they had been conducting business on the suit land and that they were only conducting repairs on their structure when the plaintiff lodged this suit and obtained orders against them. In addition, the 1st respondent stated that the portion on which the suit plot has been created is part of a road reserve and that part thereof has already been taken away by the government for the purpose of road expansion. He accused the appellant of attempting, in collusion with county officials, to fraudulently have the suit plot created out of a road reserve and purporting to extend it into Plot No 1043/III/151.

3. The appellant filed a reply to the defence on 5/3/2020 reiterating the averments in the plaint and denying the contents do the defence.

The Trial.

4. The appellant's case was heard on diverse dates between 14/6/2022 and 6/9/2022 when he testified and called two witnesses. The 1st respondents' case was heard on 18/10/2022 when the 1st respondent gave evidence and closed his case. On that date the respondent's counsel applied for a site visit but the court declined the application on the same date. Parties filed their final submissions. On 16/5/2023 judgment was reserved for 6/6/2023. On 6/6/23, the trial delivered the impugned ruling in lieu of a judgment.

The Impugned Ruling

5. In that ruling the trial court expressed its dissatisfaction with the issues as to whether the suit land is on a road reserve and whether the 1st respondent had trespassed on the suit land by extending his boundary. She stated that in the absence of a government surveyor's report the matter could not be brought to its logical conclusion. Acting suo moto, the trial court the issued orders as follows:

a. That the County Surveyor Kilifi to undertake a survey on plot no 1043/III/150 and plot no 1043/III/151 with a view of picking the boundaries and pointing out beacons if any;

b. That the County Surveyor to also clarify in his report whether any of the plots above has/have encroached on the road reserve;

c. That the Officer Commanding Station Rabai Police Station to provide security during the said exercise;

d. That the cost of the survey shall be shared equally between the appellant and the 1st respondent;

e. That the survey be conducted in the presence of both parties;

f. That the matter shall be mentioned on 27/6/2023 to set an amicable date for the survey exercise.

6. What followed that ruling is the two appeals herein which were consolidated with Appeal No 27/2023 being the lead file. I will refer to the appellant in that appeal as “the appellant” throughout this judgment and the 1st respondent in the same appeal as “the respondent” since it has been disclosed that the 2nd respondent is now deceased.

The Memorandum of Appeal in ELC Appeal No 27 of 2023

7. By a Memorandum of Appeal dated 16th June, 2023 filed by Lewa & Associates Advocates, the Appellant dissatisfied with the ruling and or Order of Honourable Nelly Chepchirchir P.M., Mariakani, dated 6th June, 2023 in Mariakani in Environment and Land Case No. 33 of 2019 - George Kavu Dzuya v James Mwakombo & Anor. appealed against the whole of the ruling and or Order on the following grounds: -

    1. That the learned trial Magistrate erred in law and fact in her Ruling dated 6th June, 2023 by departing from the Order she made on 18th October, 2022, after the closure of the 1st Respondent’s case;

    2. That the learned trial Magistrate erred in law and fact by delivering a Ruling instead of the Judgment that she was to deliver on 6th June, 2023;

    3. That the learned trial Magistrate erred in law and fact by seemingly pouring cold water on the evidence tendered in support of the Appellant’s case in the subordinate court without giving any reason for doing so;

    4. The Honourable Magistrate erred in fact and in law in giving directions on aspects of the case without jurisdiction to do so;

    5. The Honourable Magistrate erred in fact and in law in giving directions on valuation when the identity of the description of the property was a highly contentious matter in the pleadings, evidence and submissions filed by both parties;

    6. The Honourable Magistrate erred in fact and in law in giving directions in favour of the respondent intended to address and attempt to cure the weaknesses in the respondent’s case and not to assist the court in arriving at an independent decision;

    7. The Honourable Magistrate erred in fact and in law in failing to appreciate the law relating to adversarial judicial system in Kenya;

8. The Honourable Magistrate erred in fact and law in delivering the ruling and giving directions late in the day when both parties had submitted and were waiting for the delivery of the judgment;
9. That the Learned Magistrate erred in both fact and law by delivering the ruling as an afterthought instead of delivering the judgment;
10. That the Learned Magistrate erred in both law and fact by failing to consider, analyze and appreciate the law and appellant's written submissions;
11. The Learned Magistrate erred in both law and fact in being biased against the appellant;
12. That Learned Magistrate erred in both law and fact in failing to award costs to the Appellant.

8. The Appellant sought to have the appeal allowed and the Ruling and or Order of the subordinate court dated 6th June, 2023 be vacated and or set aside and that the subordinate court be directed to write and deliver judgment in the primary suit.

9. By a memorandum of appeal dated 19/6/2023 filed on the same date (being Civil Appeal No. 28 of 2023, herein after also referred to as "the cross-appeal") the respondent (though named "appellant" in his own appeal) 19th June, 2023, being dissatisfied with the whole of the ruling dated 6th June, 2023 in Mariakani Environment and Land Case No. 33 of 2019, George Kavu Dzuya v James Mwakombo appealed against the said decision on the following grounds:

1. The Honourable magistrate erred in fact and in law in failing to deliver the Judgment and instead delivering a ruling without giving parties an audience to submit on the issues relating to the findings in the ruling;
2. The Honourable magistrate erred in fact and in law in failing to accord parties the right to submit before converting the judgment into a ruling;
3. The Honourable magistrate erred in fact and in law in giving directions before making a determination on the aspect of jurisdiction;
4. That the Honourable magistrate erred in fact and law in giving directions on valuation when the identity of the description of the property was a highly contentious matter in the pleadings, evidence and submissions filed by both parties;
5. That the Honourable Magistrate erred in fact and in law in giving directions in favour of the respondent intended to address and attempt to cure the weaknesses in the respondent's case thereby exhibiting bias against the appellant;
6. The magistrate erred in fact and in law in delivering the ruling as an afterthought instead of delivering the judgment.
7. The learned magistrate erred in both law and fact in failing to award costs to the appellant.

10. The appellant sought to have the ruling of the court dated 6th June, 2023 in Mariakani in Environment and Land Case No. 33 of 2019, George Kavu Dzuya v James Mwakombo be set aside and substituted with an order striking out/ dismissing the entire suit with costs and, alternatively, an order remitting the matter to another magistrate to write the judgment. It was also sought that the respondent in that appeal (being the appellant in ELC Appeal No 27/2023) do bear the costs of the appeal and of the trial in the lower court.

Submissions on the Consolidated Appeal

11. The appeal was heard by way of written submissions, with the Appellant filing two sets of submissions dated 19th January 2024 and 23rd March, 2024 in respect of the appeal and cross-appeal respectively through the firm of M/S Lewa & Associates Advocates. Counsel submitted that both the Appellant and the 1st Respondent are aggrieved by the ruling delivered by the trial court, particularly the fact that the said court delivered a Ruling instead of the Judgement that was due for delivery.

Appellant's Preliminary Objection to Some Aspects of the Cross-Appeal

12. On a preliminary note however, counsel submitted in the submissions dated 23/3/2024 filed on the cross appeal that he does not agree with three issues advanced by the Respondent in the cross-appeal. First, on the allegation that the trial court lacks jurisdiction to hear and determine the primary suit, as advanced in ground 3 and 4 of the Respondent's record of appeal in the cross-appeal. It was his submission that the allegation that the trial court lacks jurisdiction to hear and determine the primary suit was pleaded in paragraph 4 of his statement of defence dated 24th February, 2020 and was raised in a Notice of Preliminary Objection dated 8th April, 2021 was and determined vide a Ruling delivered on the 27th July, 2021 in which the trial court held that the Preliminary Objection lacked merit and proceeded to dismiss it. According to him that ruling has to date not been vacated and or set aside either through appeal or an application for review. It was his submission that the issue of the alleged lack of jurisdiction of the trial court to hear and determine the primary suit is *res judicata* and the Respondent is estopped from discussing it. He relied on Section 7 of the *Civil Procedure Act*, 2010 and the case of *Gladys Nduku Nthuki v Letshego Kenya Limited & Ano* (2022) eKLR.

13. The second allegation the appellant disagrees with is the claim of the trial magistrate's perceived bias in favour of the appellant. Counsel submitted that in the Ruling dated 6th June, 2023, the trial court did not in any way or at all, indicate that she ordered for the survey for the reason that the Appellant had not proved his case against the Respondent; further, he averred that the fact that the Appellant did not appeal against the order of the trial court made on the 6th June, 2023, negates any notion of bias in his favour on the part of the trial court as alleged by the Respondent.

14. Lastly, counsel for the appellant submitted that the relief the Respondent is seeking in prayer (a) of the Memorandum of appeal (to the effect that the ruling and order be set aside and substituted with an order striking out/dismissing the entire suit with costs) is not available since the Appeal and Cross-appeal herein are against the Ruling and/or Order of the trial court; that this court can only determine whether the trial court was right to make the impugned order and, if the court faults the trial court, then what ought to follow is an order remitting the primary suit file to the subordinate court for judgment writing. Further, it was urged, the parties herein have moved the court in its appellate jurisdiction and not original jurisdiction and unless there is judgment delivered in the primary suit, the court herein cannot be asked to deliver judgment for and on behalf of the subordinate court as sought by the Respondent in the cross-appeal or at all.

Appellant's Submission in Support of the Appeal.

15. In the Appellant's submissions in support of the appeal 19th January, 2024, Mr. Lewa reiterated his earlier submission on the issue of Jurisdiction, stating that the 1st Respondent challenged the jurisdiction of the court to hear and determine the suit through a Notice of Preliminary Objection dated 8th April, 2021 which was subsequently dismissed.

16. Counsel also submitted that in the Plaintiff's case, PW3 testified and produced a survey report dated 28th July, 2016 as P. Exh. 2; that the 1st Respondent also testified and thereafter closed his case. Further, that parties were directed to file their submissions and on the 16th May, 2023, the court indicated that judgment would be delivered on the 6th June, 2023.

17. According to him, instead of delivering judgment the court, delivered a Ruling and made several orders directing that the County Surveyor, Kilifi County undertake a survey on the disputed portions of land with a view of picking the boundaries of the said parcels and pointing out beacons; the surveyor was also to clarify whether any of the parcels of land had encroached onto a road reserve; the survey was to be conducted in the presence of both the appellant and the 1st Respondent.

18. In addressing Grounds 1, 3 and 4 of the memorandum of appeal, counsel quoted the court on an application for a site visit where the court stated as follows: 'I believe evidence taken and document produced are sufficient. The court shall not have a site visit'. It was his submission that the order dated 18th October, 2022 was by the 6th June, 2023 still in place as it had not been set aside through an appeal or an application for review.

19. It was his submission that in making the order dated 6th June, 2023, the trial court condemned the Appellant to share in payment of the costs of the survey of the suit plot and plot number 151 by the Kilifi County Surveyor without according the Appellant the opportunity to be heard on the issue of the said costs. Citing *Said Juma Chitembwe v Edward Muriu & 4 others* (2011) eKLR which case was cited in Civil Appeal No. 6 of 2017 – *Samuel Njagi Mwangi v James Kamau Wainaina* he submitted that a person cannot be condemned unheard.

20. Mr. Lewa further submitted that in the circumstances of the dispute, the Appellant had already incurred costs in getting PW3 to carry out a survey, prepare the report produced as Plaintiff's Exh. No. 2, and paid the said witness Kshs. 25,000/- to attend court and testify on the 6th September, 2022. He asserted that condemning the Appellant to incur additional costs as ordered by the trial court without giving him a chance to be heard was an error in law and in fact on the part of the trial court.

21. With regard to grounds 2, 5 and 6 of the memorandum of appeal, he submitted that the parties herein having fully ventilated their respective cases in the primary suit, closed them and filed their written submissions, it was incumbent on the trial court to pronounce herself on the suit by writing and delivering a judgment. On this issue he relied on the decision in Civil Appeal No. 5 &48 of 2002-*Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Savings Bank* (2004). In the end, he submitted that it was an error on the part of the trial court to descend into the arena of conflict between the Appellant and the 1st Respondent in the manner she did and or at all. For this assertion, he cited the case of *Fredrick Kigwa Odullah v Titus Wanyonyi Wasianju* (2019) eKLR.

22. The Respondent on the other hand filed submissions through the firm of P.A Osino & Company Advocates on the 8th March, 2024.

23. Ms. Osino submitted that the appellant's objection to the survey is based on the ground that the court had rejected the court site visit when the respondent applied for the same and it ought not have ordered the survey. She also submitted that the identity or the description of the property was a highly contentious matter in the pleadings, evidence and submissions and the court was enjoined to make a determination on it based on the evidence on record.

24. It was her submission that the survey report produced by the appellant was done on a separate Plot No. 1043/111/150 and not Plot No. 150 Mazeras Township. She relied on the case of Esther Rumba v Paul Mulatya Moki Civil Appeal No. 7 of 2020 (unreported) where the court held that parties are bound

by their pleadings and urged that issues for determination by a court flow from the pleadings as was held in the cases of *Philmark Systems Co. Ltd. v Andermore Enterprises* (2018) eKLR and *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others* (2014) eKLR.

25. She further submitted that a site visit cannot be equated to a survey for the reason that a site visit enables the court to see the structures on the ground as shown by the parties while a survey establishes the identity of the plot, ownership details and the measurements based on the records held by both the national and county governments. According to her, the trial court in ordering for survey, erred as it was assisting the appellant in an adversarial system of law.

26. It was also her submission that the said ruling was contrary to the provisions of Article 27 (1), 47 (1) and 50 (1) of the *Constitution*which emphasizes the right to a fair trial and equality before the law and parties ought to have been allowed to submit on the issue of survey before the order was made considering that the parties were waiting for judgment.

27. Ms. Osino submitted that the trial court, in ordering for a survey, was biased because the ownership, description, location, identity and size of the suit property had not been established by the appellant and the order by the court was made to favor the appellant who had totally failed to prove his case.

Analysis And Determination.

28. The Ruling that is the subject of this appeal is the one dated the 6th June, 2023. I have carefully perused the Records of Appeal filed by both parties and in my view the issue for determination is whether the Ruling and or Order of the subordinate court dated 6th June, 2023 ought to be vacated and or set aside and the subordinate court be directed to write and deliver judgment in the primary suit, and further whether the file ought to be placed before a different magistrate for the writing of judgment.

29. The issues that arise for determination in this appeal and cross-appeal are as follows:

    a. Whether the trial court has jurisdiction of the court to hear and determine the matter;

    b. Whether the prayer seeking an order that the ruling dated 6/6/2023 be set aside and be substituted with an order striking out or dismissing the entire suit can be entertained in the present appeal;

    c. Whether the respondent has established that the trial magistrate was biased;

    d. Whether the ruling dated 6/6/2023 ought to be vacated and the trial magistrate ordered to deliver her judgment on the basis of the evidence on the record;

    e. Who should meet the costs of the appeal?

30. On the issue of the Jurisdiction of the court to hear and determine the matter, I note that the respondent filed a Preliminary Objection dated 8th April, 2021 which was dealt with vide a Ruling dated 27th July, 2021 with the court dismissing it for lack of merit.

31. Section 7 of the *Civil Procedure Act* provides that:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

32. I am guided by the cases of *Invesco Assurance Company Limited & 2 others v Auctioneers Licensing Board & another and Kinyanjui Njuguna & Company Advocates & another (Interested Parties)* (2020) eKLR the court held that:

> " ...for the bar of *res judicata* to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:
>
> i. The suit or issue raised was directly and substantially in issue in the former suit.
>
> ii. That the former suit was between the same party or parties under whom they or any of them claim.
>
> iii. That those parties were litigating under the same title.
>
> iv That the issue in question was heard and finally determined in the former suit.
>
> v That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit."

33. The respondent did not take any action to have the said ruling set aside either through appeal or review. In my view, the issue of jurisdiction of the court is one that the trial court had an opportunity to hear and determine which is now *res judicata* in that court. The ruling on *res judicata* is separate from the ruling impugned in the present appeal. 27th July, 2021 is the date on which the trial court gave a ruling on *res judicata*. An appeal against that decision ought to have been lodged within 30 days from that date. The present appeal by the 1st respondent herein was filed on 19/6/2023, almost two years later. Extension of time was not sought to appeal against the said decision. Therefore, to entertain the issue of jurisdiction of the trial court in the present appeal is therefore tantamount to admitting an appeal for hearing through the backdoor and I shall not allow it.

34. Regarding whether the ruling dated 6/6/2023 ought to be set aside and substituted with an order striking out or dismissing the entire suit with costs as proposed in the respondent's prayers, that order may only be done if the issue of jurisdiction of the lower court was live before this court on appeal or a final judgment was under challenge in this appeal. However, as stated earlier, this appeal is not against the ruling on the preliminary objection that was overruled by the court on 27/7/2021; neither is the present appeal against a final judgment of the trial court below. That suit is not yet finalized. For those two reasons, this court fails to see how in the circumstances an order dismissing or striking out the suit in the court below can be issued in the present appeal. The first prayer in the respondent's cross-appeal should therefore be rejected.

35. Regarding the issue of alleged bias, it is clear why the respondent is crying foul. For the respondent, his concern is that the court declined his application made at the end of the hearing of evidence for a site visit, and in his view the issue of the suit plot being a part of the road reserve having been raised by the appellant and in his opinion the appellant having failed to prove his case, the order for a resurvey would finally be in aid of the appellant. He does not understand why the court suddenly got doubts and ordered a survey after ruling out a site visit he had applied for. He states that all these aspects point to bias against him which goes against the constitutional principles laid out in Articles 27(1), 47(1) and 50(1) of the *Constitution*.

36. A citizen is entitled under the provisions of Article 50(1) to trial by an impartial court, tribunal or other body. The claims of bias should not be made or taken lightly as impartiality is the cornerstone of both procedural and substantive justice and a clear jurisprudence. In the present appeal the respondent has

in the cross-appeal gone as far as seeking an order that matter be remitted to another magistrate other than Hon. Nelly Chepchirchir, to write the judgment.

37. In *Kibisu v Republic* (Petition 3 of 2014) [2018] KESC 34 (KLR) (28 February 2018) (Ruling) it was stated as follows:

> “ 59. We agree that bias is *prima facie* a factor that may lead to a judge recusing himself from a matter. Such an action is meant to safeguard the sanctity of the judicial process in tandem with the principle of natural justice that no man should be a judge in his own case and that one should be tried and/or have his dispute determined by an impartial tribunal. This is what is provided for in Article 50(1) of the *Constitution* thus:“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.
>
> 60. What is bias? The Oxford English Dictionary defines bias thus: “as an inclination or prejudice for or against one thing or person”. The *Blacks' Law Dictionary 9th edition* defines the word bias as “Inclination; prejudice; predilection”. Hence, as one of the fundamental tenets of the Rule of Law is impartiality of the judiciary, in circumstances where bias is alleged and proved, then the pragmatic practice is that the particular judge or magistrate will as a matter of course recuse/remove himself from the hearing and determination of the matter.
>
> 61. From the onset, it is worth noting that when interrogating a case of bias, the test is that of a reasonable person and not the mindset of the judge. That is why in *Tumaini v Republic* [1972] EA LR 441 Mwakasendo J held that “in considering the possibility of bias, it is not the mind of the Judge which is considered but the impression given to reasonable people.”

38. One concern this court has encountered is whether this court ought to rule on the issue of bias in the present appeal in view of the fact that in the event this court orders the lower court to deliver a judgment based on the evidence on record, or even allows it to proceed to procure the county surveyor's evidence, an appeal against that substantive judgment may be later lodged by one of the parties or both.

39. The second concern is that though it is customary for parties to apply to a court for self-recusal orders, no primary application, either oral or written, for her self-recusal has been made before the trial magistrate, and this court would though be acting on appeal in these proceedings, be ruling on bias as a first instance court if it determined the issue.

40. I have cleared my mind of apprehension on the first point immediately herein above by taking the stance that the claim of alleged bias arises only out of the order made in the ruling impugned in this appeal only. If other grounds of bias are found prior to the final judgment, and an appeal is lodged upon those grounds, an appellate court may proceed to rule on the issue as part of the appeal against the final judgment of the trial court below. The determination of whether or not the magistrate's ruling or general conduct of the suit before him bore any hallmarks of bias would therefore be raised in an appeal against the final judgment of the trial court which judgment has not yet issued.

41. Regarding the second point above however, though the disqualification of the trial magistrate is sought in this appeal and is not an application for self-recusal in the lower court, I find it apt to quote the following passage, which I find relevant, from the [*Kibisu case*] (*supra*):

> " In Kenya the Court of Appeal in the case of *Republic v Mwalulu & 8 Others*: [2005] 1 KLR the court did set up the principles on which a judge would disqualify himself from a matter and stated as follows:
>
> 1. When the courts are faced with such proceedings for the disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established.
>
> 2. In such cases the Court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their case they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the Judge, Magistrate or Tribunal.3.The Court dealing with the issue of disqualification is not, indeed it cannot, go into the question of whether the officer is or will be actually biased. All the Court can do is to carefully examine the facts which are alleged to show bias and from those facts draw an interference, as any reasonable and fair-minded person would do, that the judge is biased or is likely to be biased."

42. In brief, what this court is being asked to do is to carefully examine the facts which are alleged to show bias and from those facts draw an interference, as any reasonable and fair-minded person would do, that the judge is biased or is likely to be biased.

43. In the present case the evidence resulting from the survey proposed by the trial court would, if the order is implemented, be submitted to court by a government surveyor who is the custodian of the records relating to survey. He would be expected to be an impartial witness. However, the issue that would remain is whether it was proper for the magistrate to make the order at all or at the stage she did, and if the making of that order per se, or taken into consideration alongside any other antecedent facts in the case or proceeding she undertook is evidence of bias.

44. A cursory look at the pleadings of the trial court indicates that PW3 testified and produced a survey report dated 28th July, 2016 as P. Exh. No. 2; that the 1st Respondent also testified and thereafter closed his case. Further, that parties were directed to file their submissions and on the 16th May, 2023, the court indicated that judgment would be delivered on the 6th June, 2023. On the said date however, instead of delivering the judgment, the trial court delivered a Ruling requiring the County Surveyor, Kilifi County undertake a survey on the disputed portions of land with a view of picking the boundaries of the said parcels and pointing out beacons.

45. Though ordinarily a case ought to be heard and determined on the basis of pleadings presented before court, it is the case that a court should not ordinarily interfere with the manner in which the parties wish to conduct their case. The dispute between the parties herein is one of trespass. There is also a clear pleading by the appellant in his defence a vital issue of whether or not the suit land encroaches on a road reserve. Though the court in an earlier ruling asserted that the evidence taken and documents produced were sufficient and the site visit would not be necessary, it later emerged that the court, after

considering the matter and before it issued its final judgment in the matter, sustained serious doubts as to whether the evidence on record was sufficient to enable it issue a conclusive determination on some of the issues in the pleadings, including whether or not the suit land encroached on a road reserve.

46. It is crucial to note that a court of law has a broad discretion to issue directions as to how litigation before it is to be conducted. Some of the directions issued under that discretion deal with procedural issues for the proper midwifing of justice for the parties while others, which are rare, go into the merits of a case. The trial court in the ruling impugned in the present appeal gave orders that can only be categorized into the second genre. This is because the evidence submitted by the county surveyor would be of substance, and would be taken into account and probably sway the court's decision. Nevertheless, and this is the objective position on the matter, the county surveyor is a public officer and he is expected to tell the truth as it is. If the truth is that the suit land forms part of a road reserve then that would be to the disadvantage of the respondent, but it is also the position that the evidence of the county surveyor may not ultimately render any material advantage to the appellant's case even though it is the appellant who raised the issue of encroachment on a road reserve as a road reserve remains public property. Indeed, the respondent has not established that any material benefit would accrue to the appellant from the implementation of the trial court's ruling. It has not been demonstrated that there is probability that the county surveyor is in any manner or for any reason likely to issue a report favouring the appellant's sentiments that the suit land forms part of the road reserve.

47. The evidence that the county surveyor would give in the report commissioned by the court is in the category of expert evidence. Courts deal with complex matters and at times thirst for any relevant expert evidence which the parties are in a position to avail and sometimes the parties fail to rise to that occasion. I do not perceive any of the parties herein as suggesting that there is no law prohibiting the court from requesting for additional expert evidence to aid it in the processing of a final decision that will ensure that all issues in dispute are finally determined.

48. In the present appeal, while one party alleges bias as the ground for the present appeal and claims that the other party has failed to establish its case, the other party thinks that the surveyor's evidence he produced is sufficient to finally determine the dispute. In the midst of all these conflicts, this court is alive to the fact that the suit is still pending and that the final decision of the trial court finalizing the matter before it will be the judgment.

49. It is the content of the judgment that will determine whether the surveyor's report has been taken into consideration or not, thereby triggering the issue as to whether it ought to have been ordered to be availed in the first place. Each of the parties would be entitled to appeal against the said final judgment in the event they will be dissatisfied. Since reliance on the surveyor's report in the judgment will be inextricably intertwined with the timing and the manner in which it was obtained, at that appeal, if any will be lodged, it may be possible to ventilate on the propriety of the procurement of the said document.

50. The County Surveyor is not a party to the present suit. It is the case that the *Civil Procedure Rules* provide that the court may not dismiss a case for misjoinder or non-joinder of parties. It must determine the suit before it in so far as the parties named in the suit are concerned. It is clear from the documents filed in this appeal that the trial court has already made up its mind that it requires the evidence of the county surveyor to help in the determination of all the issues raised by the parties, including whether or not the suit land falls on a road reserve. That is a decision relating to both procedure and merits of the case and will definitely affect the final outcome. How then can this court step in and interfere with the manner in which the trial court is to carry out its business? Both parties simply want the court to proceed to judgment on the existing evidence, which final decision may end up being appealed, yet its act of requisitioning the county surveyor's evidence is so inextricably intertwined with the thought process that will lead to the court's final judgment in the matter. It is clear from the foregoing then

that this court would then be interfering with the broad discretion of the trial court if it barred that court from receiving the report and instead ordered it to proceed to write the judgment on the basis of only the evidence on the record while it is dissatisfied with the sufficiency of the evidence before it. The challenge raised against the court's decision dated 6/6/2023 is premature and ought to be raised during an appeal, if any, against its final judgment in the suit.

51. In this court's view the purpose of the court in issuing the ruling dated 6/6/23 was to ensure that all issues arising in the matter are fully and conclusively adjudicated. Whether that was the right course of action and whether or not there was bias are separate issues.

52. Owing to the above analysis, this court arrives at the conclusion that the trial court never descended into the arena of conflict. As submitted by Ms Osino, the site visit and a survey exercise are two different things. If it was of the opinion that only a survey by the county surveyor could satisfy it, I think the court was entitled to make the decision that it made notwithstanding that it had rejected a site visit earlier. It simply exercised its mandate to midwife justice and there was no party who was condemned unheard.

53. For the foregoing reasons too, this court comes to two conclusions as follows:

    (1) As stated herein before in this judgment, the issue of bias is a serious issue that requires to be fully substantiated. As the issue is likely to permeate through every spectrum of the judgment and it can be raised in any appeal against the trial court's judgment, I find that this court ought not make any substantive determination on the issue as to whether or not the trial court was biased in any manner in making the decision that it made in the impugned ruling.

    (2) I find that this court should not interfere with the trial court's order that the survey be done.

54. As to the complaint that one of the parties who had already commissioned a survey report would be compelled to undergo a second tranche of expenses in financing the county surveyor's survey exercise, it is noteworthy that litigation is necessarily an expedition to find out the truth to facilitate justice and the quest for justice does not come cheap. The only placebo that this court can give to alleviate that party's pain is the assurance that at the end of the litigation concerning this dispute, there will be an adjudication concerning costs. Truth and justice ought not be sacrificed at the altar of costs in view of the existence of legal provisions governing how costs shall be apportioned at the end of the litigation.

55. In the circumstances, this court is of the opinion that the ruling and order delivered and issued by the trial court on 6th June, 2023 should not be disturbed by this court. Consequently, both the appeal (Malindi ELC Appeal No 27 of 2023) and the cross-appeal (Malindi Elc Appeal No 28 Of 2023) herein are hereby dismissed with no order as to costs of both and the said ruling and order of the trial court delivered and issued on 6/6/23 shall therefore remain in force. The Deputy Registrar of this court shall return the original trial court record to the trial court expeditiously to enable the parties comply with the court orders of 6/6/23 and for the trial court to thereafter conclude the suit by writing a judgment thereafter.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 31ST DAY OF JULY, 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.