Japata Agricultural Development Corporation v Mungusho & 2 others (Environment and Land Appeal E003 of 2024) [2024] KEELC 5733 (KLR) (31 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5733 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND APPEAL E003 OF 2024

FO NYAGAKA, J

JULY 31, 2024

BETWEEN

JAPATA AGRICULTURAL DEVELOPMENT CORPORATION ..... APPELLANT

AND

FREDRICK MAKOKHA MUNGUSHO ..... 1ST RESPONDENT

DANIEL SIMIYU KHAEMBA ..... 2ND RESPONDENT

MARGARET NASAMBU CHAKALI ..... 3RD RESPONDENT

(Being an appeal arising from the ex parte order of the Hon. M. M. Nafula Principal Magistrate made on 12/01/2024 in Kitale CMCC No. 6 of 2024 on the Plaintiff's Application dated 11/01/2024)

JUDGMENT

1. This Appeal relates to a decision made by the trial court at the *ex parte* of an Application, which determination raised more heat than light until it was placed before me for determination. What can neither be gainsaid nor lost sight of is that many thoughts go through the judge's mind when he/she sits over any decision and this appeal is not an isolated case, the main question being, "what went on during the exercise of discretion at the *ex parte* stage that even the decision-maker would excuse self at the inter partes stage?" Thus, from the outset it should be abundantly clear that the conduct of a judicial officer should be beyond reproach: like that of Caesar's wife.

2. This Court does not know how virtuous Caesar's wife was but history has it that she was so pure that she was completely beyond any suspicion of impurity. And so it should be of he/she unto whom it has been entrusted the instruments of authority to judge fairly and impartially. And if for any reason he/she is misled to think that the hearts and eyes of men will not hear and see whatever secret thoughts and actions he/she might have it should not be lost sight of the reality that there is One in secret before whom ALL the thoughts, actions and words of men is clear and open to as noonday, before whom "...

we must all appear before the (His) judgment seat…" (2 Cor 5: 10) and "… give account…in the day of judgment" (Mat. 12:36). This should always play at the back of the mind of every judicial officer, and anyone who is in the position of authority in anything, whether he/she be powerful or weak.

3. The caution above is given in view of the brief but arduous history of the file in respect of the Chief Magistrate's Court at Kitale, Civil Case No E006 of 2024 in respect of which the instant appeal relates, however short the period has been. I summarize the history below.

4. On 12/01/2024, the matter is placed before Court 6 which issues the orders impugned. On the same date the matter is supposedly placed before Court 5 for allocation to a specific court but from the handwriting and signature on the record, it is allocated to Court 5 by Court 6. On 18/01/2024, it is placed before Court 5 under Certificate of Urgency for consideration of a new application but the Court refers it to the Court that issued the orders impugned. On 24/01/2024, it is placed before Court 6 for consideration of both the initial and latter applications but refers it to Court 5. It is placed before Court 5 the same date. The Court refers it to the Head of Station (HoS) for directions on 29/01/2024. On 29/01/2024 the HoS notes that the orders impugned were issued by Court 6 and refers the matter to the said Court. On 07/02/2024 the file is placed before Court 6 which recuses itself from hearing the matter "due to personal reasons". It refers the matter to the HoS once again for reallocation. On 12/02/2024 it is placed before the HoS who allocates it to Court 3. On 12/06/2024 it is placed before Court 3 which gives a date for directions. On 27/06/2024 Court 3 directs that the file be placed before the ELC Judge on 01/07/2024 for reasons that the subject in it is the same as the one in ELC No 40 of 2019 which is pending hearing and determination before the judge. On 01/07/2024 it is placed before the HoS who refers it for mention in Court 3 on 04/07/2024 and on the latter date Court 3 refers it to the judge for mention on 15/07/2024 but it is placed before me on 16/07/2024 when it is finally mentioned alongside the instant appeal.

5. With that brief six-months odyssey in mind this Court wonders whether any reasonable 'bystander' or person would not raise eyebrows over what was going in the matter as it was before the trial court. This was because, the Court issued *ex parte* mandatory orders which by their nature determined the entire suit at the time, and then it declined to handle it, and recused itself from the matter, citing undisclosed personal reasons, when the affected party sought to review the orders. This left the Appellant in a an extremely helpless situation. Worse was that the purpose of the orders having seemingly been achieved, the Respondents purported to withdraw the suit. This was done without notifying the Appellant (parties) as required by Order 25 Rule 1 of the *Civil Procedure Rules*. This Court has determined the issue of the purported withdrawal in a separate ruling. This Court doubts if Caesar's wife could have acted in the same manner: there is suspicion written over the 'face' of the Plaintiffs/ Respondents. Did they intend to use the court process to achieve a hidden agenda? Why not want to he heard yet they had obtained *ex parte* and acted on orders that affect others parties not heard?

6. This now turns this Court to determining the appeal.

The Plaintiffs' Pleadings in the Lower Court

7. Through a Plaint dated 11/01/2024 the Respondents (then Plaintiffs) sued the Appellant (then Defendant) in the Chief Magistrates Court at Kitale in Civil Suit No 6 of 2024. It should be clear that the issue of whether the suit was indeed a civil one or a Land matter has been determined through Ruling delivered by this Court on a Preliminary Objection over the Jurisdiction of this Court on 19/07/2024. In the Ruling the Court found that the subject matter before the lower court (as per the Plaint) was who owned land parcel No LR 6106/4 over which the deceased, one Amos Barasa Masika, was to be buried. It was not on who was supposed to bury the deceased person.

8. Simultaneous with the filing of the suit, the Plaintiffs filed under Certificate of Urgency a Chamber Summons Application dated 11/01/2024. It was not premised on any Rules of Procedure or statutory provision. Nevertheless, they prayed for orders that:

    1. That the application be treated as urgent and service thereof be dispensed with at the first instance.

    2. That a temporary injunction be issued against their first Defendant/Respondent by itself, servants and all agents restraining it from stopping/preventing the Plaintiffs/ Applicants from interring the remains of Amos Barasa Masika, deceased on the parcel of land No LR 6106/4 (the suit property) pending the hearing and determination of this application inter parties.

    3. That at the inter parties hearing Prayer 2 above be confirmed and till further orders of the court or until the determination of this suit.

    4. That the Officer Commanding Chepchoina Police Station be ordered to ensure that the burial of the late Amos Barasa Masika, who died on 23rd December, 2023 is conducted by the deceased family without any interference from any quarters.

    5. That the costs of this application be provided for.

9. The application was based on several grounds which are summarized as follows. The Plaintiffs/ Applicants were the registered owners of parcel No LR 6106/4 (the suit property). The deceased acquired a piece of land on the suit land where he had established a home. The deceased did not have any home elsewhere where his body could be buried but only on the property. The deceased and his family had been on the portion of land since he was born. The families of the Plaintiffs and the deceased have been in occupation of the land in question since 1958. Before the suit was filed, the family members of the Plaintiffs who have since died have been buried on the suit land whenever they died. The Defendant was keen on preventing the Plaintiffs from burying the deceased on the suit land. Unless an injunction was issued, the Plaintiffs/Applicants would be prejudiced in a manner damages cannot remedy. The ownership of the suit land was pending determination in Kitale ELC No 40 of 2019 and it was in the interest of justice that the application be granted.

10. The application was supported by the affidavit of Frederick Makokha Mungusho. Its depositions were a repetition of the contents of the grounds in support of the application. However, he added that the Applicants were registered owners of the suit land. He annexed and marked as FMM 1 a copy of Lease Agreement. He also annexed and marked as FMM 2 (a) and (b) photographs of the homestead of the deceased. He prayed that the application be allowed since it was made in good faith.

11. When the application was placed before the learned trial magistrate she issued the following orders:

    1. That their application is certified urgent.

    2. A temporary injunction is hereby issued against the Defendant/Respondent by itself servants and/or agents restraining it from stopping/preventing the Plaintiffs/Applicants from interring the remains of Amos Barasa Masika - deceased - on the parcel of land LR No 6106/4 (the suit property) pending the hearing and determination of this application inter parties.

    3. That is the application applicants to serve the application.

    4. That inter partes hearing before court No 5 on 24th January 2024.

    Following the issuance of the orders the Defendant was aggrieved. It appealed to this Court on the following grounds:

1. The learned trial magistrate acted in total disregard of the law when she proceeded to make *ex parte* orders, which turned out to be final orders and before the date set for hearing and before the appellant could file the response, hence condemned it unheard.

2. The learned trial magistrate erred in law and in fact in proceeding to issue an *ex parte* order on February 12th January, 2024 to facilitate burial on Saturday 13th January, 2024 and set inter partes hearing on 24th of January, 2024 after the Respondents had already enforced the said orders.

3. They learned trial magistrate erred in law and in fact when she condemned the appellant unheard, an action which goes against the rules of natural justice.

4. The learned trial magistrate erred in law and in fact in failing to consider that her court lacked jurisdiction to deal with this matter in which the land subject matter was alive in the superior court vide Kitale ELC Civil Case number 40 of 2019, for which reason the entire proceedings hearing were nullity and void ab initio.

5. The Land's trial magistrate acted in total disregard of the law when she proceeded and made orders which were final without first hearing the defence case thereby ignoring the defendant's intended defence and the response was yet to be filed at the time and which raised several tribal issues.

6. Then learned trial magistrate erred in law and in fact in recusing herself to hear the appellants case on review of the order this subject of this appeal a decision she arrived at by misinterpreting the law and failing to apply the relevant legal principles and rules.

7. The learned trial magistrate erred in law and in fact by allowing the respondents to bury the remains of Amos Barasa Masika on land parcel number 6106/4 owned by the appellant, a government entity with ownership documents and in occupation.

12. Soon after the filing of the appeal the Appellant filed a Record of Appeal dated 07/03/2024. Upon service of the appeal, the Respondents filed a Notice of Preliminary Objection dated 06/05/2024. The Preliminary Objection was to the effect that the entire appeal be determined in limine since the honorable court lacks jurisdiction to sit as an appellate court on a (decision made by the) lower court in Civil Suit No E006 of 2024. The preliminary Objection has since been determined and overruled vide a ruling delivered on 19/07/2024, paving way for the hearing of this appeal on merits.

13. The Appellant begun its submissions dated 05/07/2024 by giving a brief history of the appeal hearing. This Court has already given the summary of the history above hence there is no need to repeat how the Appellant narrated it.

14. They proceeded to argue that the issue before the trial magistrate was not about burial per se but ownership of the suit land and that being the case the value of parcel number LR 6106/4 was way beyond the jurisdiction of the trial court. Therefore, the court did not have jurisdiction to issue the orders it did. Moreover, the Appellant submitted that the Respondents were enjoying expert orders after having buried the deceased on the suit land in breach of principles of natural justice which required that a party ought to be heard, and also contrary to the orders granted in Kitale ELC No 40 of 2019 in which they were barred from interfering with the use of land parcel number LR 6106/4 pending the hearing and determination of the main suite. It prayed that the appeal be allowed.

15. On their part, the Respondents did not file submissions. That notwithstanding this Court is obligated to consider the merits of the appeal since submissions constitute neither pleadings nor evidence of any

party. This has been stated by the Court of Appeal in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR, where the Court held:-

> " Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

16. This court has considered this appeal. The principles governing determination of appeals arising from orders or decisions made by a Court in the exercise of discretion are well settled. An appellate court will always be slow in interfering with the exercise of discretion by the trial court. Thus, it will not interfere with the decision unless it was clearly or plainly erroneous; or either the trial court misunderstood and misinterpreted the law or facts; or he either took or failed to take into account matters he ought to have done so.

17. In East Africa, from as early as the late 1960s the general principles governing when an appellate court may interfere with the exercise of discretionary power by a trial court were made clear by the apex court. In *Mbogo & another v Shah*, [1968] EA appellate Court stated as follows: -

> " An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice."
>
> "The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice."

18. This was repeated fifteen years later in *Shanzu Investments Ltd v Commissioner of Lands* [1993] eKLR where, in considering whether or not to set aside an *ex parte* judgment, the same Court held as follows:

> ''The jurisdiction to vary judgment being a judicial discretion should be exercised judicially; and, as is often said, whether judicial discretion should be exercised or withheld in a party's favour, depends, on a large measure, on the facts of each particular case. The tests for the exercise of this discretion are these: - First, was there a defense on the merits? Secondly, would there be any prejudice? Thirdly, what was the explanation for any delay?''

19. In *United India Insurance Co. Ltd., v East African Underwriters (Kenya) Ltd.*, [1985] EA 898, Madan, J.A., (as he then was), stated that:

> " The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: First, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account of; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong".

20. In the instant appeal, this Court notes that Kitale CMC Civil Suit No 6 of 2024 it is clear from the pleadings therein, specifically, ground (j) of the Application in respect of which the orders impugned were given and paragraph 11 of the Affidavit sworn by Fredrick Makokha Mungusho in Support of the Application that the applicants indicated both in the content of the ground and deposition that "the ownership dispute over parcel land No LR 6106/4 is pending hearing and determination vide Kitale ELC No 40 of 2019." Then they proceeded to make the prayers to bury the said Amos Barasa Masika (deceased) on the same parcel of land whose ownership had not been decided by the learned trial judge, and the learned trial magistrate granted them the orders. Clearly, this was a cardinal issue which the trial magistrate ought to have taken into account. It was immaterial whether the matter was pending determination in a court of equal jurisdiction or a higher one, as was in this case. This was because under the legal system of Kenya, and in terms of Articles 162(1) and (2) as read with Article 169(1) of the *Constitution*, besides the Common Law doctrine of hierarchy of courts, this Court is of a higher hierarchy than the trial Court. This fact should have played in the mind of the learned trial magistrate who should have then downed her tools to let the issue of ownership to be determined first by this Court. By issuing orders on a matter that was pending before a Court of a higher hierarchy than hers, the learned trial magistrate proceeded on a trajectory of lack of jurisdiction as argued in the appeal. Even if the court was of equal jurisdiction, Section 6 of the *Civil Procedure Act* obligated the learned trial magistrate to stay the proceedings in the suit until the hearing and final determination of Kitale ELC No 40 of 2019. By failing to take into account the said matter, the learned trial magistrate erred in law and fact in exercising discretion as she did, and this Court is obligated to interfere with it. Thus, the fourth ground of appeal succeeds.

21. The appellants seem to have taken the argument regarding the first, second, third, fifth and seventh grounds of appeal in as one. And, indeed, the stated grounds can be combined into one simple argument or point of contention: the learned trial magistrate erred in giving *ex parte* orders which were final in nature, thereby denying and depriving the Defendant (now Appellant) an opportunity to be heard, contrary to the rules of natural justice.

22. This Court has carefully considered the combined grounds of appeal. It has analyzed the argument with the record of the trial court. The Respondents approached the said court with the averment that the Appellant was keen on preventing the burial of one Amos Barasa Masika (deceased) on land parcel No 6106/4 on which he was alleged to have had a home yet the Respondents had nowhere to bury the said deceased person. They then misled the Court in their pleading that there was no suit pending between them and the Appellant and verified the averment vide an Affidavit sworn by the 1st Respondent, yet they knew and acknowledged vide the grounds of the Application and paragraph 11 of the supporting affidavit which he swore on the same date that Kitale ELC No 40 of 2019 was still pending before this Court.

23. Then they sought similar final reliefs both in the Plaint and the Chamber Summons. By the Plaint, the Plaintiffs sought the following reliefs: for a permanent injunction against the Defendant/Respondent by itself, servants and all agents restraining it from stopping/preventing the burial of the deceased Amos Barasa Masika land parcel No LR 6106/4, and upon grant of the relief the Officer Commanding Chepchoina Police Station to ensure compliance of the orders (or so to say supervise the execution of the orders) by ensuring that the burial of the late Amos Barasa Masika was conducted by the deceased family without any interference from any quarters.

24. Accompanying the Plaint was a Chamber Summons dated 11/01/2024 by which they sought, at the *ex parte* stage, for orders that a temporary injunction against the Defendant/Respondent by itself, servants and all agents restraining it from stopping, preventing the Plaintiffs/Applicants from interfering with the interment of the remains of Amos Barasa Masika, deceased on the parcel of land

No LR 6106/4 (the suit property) pending the hearing and determination of this application inter parties, and upon grant of the same the supervision thereof by the Officer Commanding Chepchoina Police Station to ensure the burial was conducted by the deceased family without any interference from any quarters.

25. When the matter was placed before the trial court, it issued the order as prayed save that it did not direct that the Officer Commanding Chepchoina Police Station ensures the burial was conducted. From the documents filed subsequent to the application it is not denied that, and indeed, the burial was conducted on the suit land on the following day.

26. It does not need rocket science to deduce that the orders granted at the *ex parte* stage were basically, final ones. The subject matter of the suit was not the supervision of the burial by the police but the determination of where the burial was to take place, and attendant to that, who owned land parcel No LR 6206/4 on which the Plaintiffs prayed that the burial does take place. Since the Court ordered *ex parte* that burial takes place on the parcel of land, it basically determined where it would take place and indirectly that the parcel of land on which it was to take place was owned by the Plaintiffs. It rendered the subsequent trial of the suit otiose. That being so, it was a mere academic exercise to purport to hear the application inter partes on 24/01/2024 or any other subsequent date. Similarly, the final reliefs sought by the Applicants were spent immediately the order was issued, and executed. That clearly condemned the Defendants (now Appellants) unheard or denied them a hearing. This was both against the principles of the *Constitution* 2010, and rules of natural justice. The decision ran counter Article 50(1) of the *Constitution* which provides that "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."

27. Thus, this Court is of the view that in arriving at the decision impugned the learned trial magistrate misapprehended the facts and made a decision which was plainly wrong: put clearly, it was illegal. This court must interfere with it.

28. Lastly, this Court has carefully perused the pleadings and list of documents filed in the trial Court. The Plaint and the written witness statement refer land parcel No LR 6106/4. Similarly, the List of Documents dated 11/02/2024 refer to the same parcel of land. A copy of the title document referred to by the Plaintiffs as the Lease Title (sic) is annexed thereto. Instead it is Grant Number I.R. 1755 in respect of LR No 6106/4. It shows that the suit parcel of land measures approximately, five eight six decimal eight one five nought (586.8150) hectares. It does not call for much inquiry to deduce that the monetary value such a huge tract of land measuring approximately one thousand four hundred and fifty point zero five one (1450.051) acres situate within Trans Nzoia County far exceeds the pecuniary jurisdiction of the trial court that made the decision appealed from. In Trans Nzoia where agricultural land costs as much as Kshs 3,000,000/= per acre, even if an acre of the suit land were to be valued at a paltry Kenya Shillings twenty-thousand (Kshs 20,000/=) only the total would translate to Kshs 29,001,020/=.

29. The upshot is that the entire appeal herein succeeds. It is allowed as prayed. Consequently, it is ordered as follows:

    a. This Appeal is allowed, with costs to the Appellant.

    b. The *ex parte* order issued by the learned trial magistrate on 12th January, 2024 Kitale CMCC No E006 of 2024, between Fredrick Makokha Mungusho, Daniel Simiyu Khaemba and Margaret Nasambu Chakali v Japata Agricultural Development Corporation, and all the consequential orders thereto be and are hereby set aside.

c. The entire proceedings in Kitale CMCC No E006 of 2024 are hereby declared a nullity and void ab initio since the Court trial (subordinate) court lacked jurisdiction to entertain the suit, and in addition that the subject matter was alive in Kitale ELC. No 40 of 2019, and the same is dismissed with costs to the Defendant therein.

d. Further, it is hereby ordered that the trial court does not have jurisdiction to hear and determine the Counterclaim filed in the said suit, being Kitale CMCC No E006 of 2024 and the same is dismissed with no order as to costs.

e. There be and is hereby an order for the exhumation of the remains of the late Amos Barasa Masika interred on land parcel No LR 6106/4 pursuant to the orders issued on 12/01/2024. The exhumation be carried out, within the next fourteen (14) days or so soon thereafter, under the supervision of the Trans Nzoia County Public Health Officer(s) and the Officer Commanding Station Chepchoina Police Station (and or his duly designated officers).

f. The cost of the entire exhumation exercise, to be determined jointly by both the County Public Health Office and the Officer Commanding Station Chepchoina Police Station and Endebess Police Station be met by the Respondents, and in default of advance payment, the two offices proceed to execute the orders herein, and the Appellants do meet the ascertained costs, and any that may be incurred for preservation of the remains as directed in (f) below, and file the expenditures herein for adoption as the part of the decree of the court for immediate execution against the Respondents, even before taxation of the costs of this Appeal and assessment of the costs of the lower court, and be refunded to it.

g. The remains of the said Amos Barasa Makokha (deceased) be preserved, at the cost of the Respondents, either the Kitale District Hospital and be handed over to them and/or to any designated family member(s), upon request and clearance of the cost of preservation, for interment or disposal elsewhere than the suit land as and when they will determine or in any hospital of their choice.

h. The Kitale District Hospital be at liberty to apply to this Court, through the Appellants, for any further orders as to costs and disposal of the remains of the deceased Amos Barasa Makokha, after the passage of reasonable time of preservation of the remains, if there be delay and the Respondents shall not have taken steps, on notice being issued by the Hospital for that purpose, to collect them for final rest or burial.

i. The decree herein be extracted forthwith for execution.

30. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA TEAMS PLATFORM THIS 31ST DAY OF JULY, 2024.

HON. DR. IUR F. NYAGAKA,

JUDGE, ELC KITALE

In the presence of:

Ms. Rachel Auta Advocate for the Appellant

Ms. Mukanda Advocate holding brief for Nakitare Adv for Respondents