Mitugo v Mugao (Environment and Land Appeal E010 of 2023)
[2024] KEELC 5708 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5708 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

ENVIRONMENT AND LAND APPEAL E010 OF 2023

CK YANO, J

JULY 25, 2024

BETWEEN

SILAS KARIUKI MITUGO ..... APPELLANT

AND

FRANCIS MUGAO ..... RESPONDENT

JUDGMENT

Introduction

1. This judgment emanates from the ruling of Hon. Mbayaki Wafula, Principal Magistrate in Marimanti Principal Magistrate's Court ELC Case No 12 of 2017 rendered on 27th April, 2023 wherein the trial court dismissed the appellant's application dated 5th October, 2022 in which the appellant sought the following orders:

    1. That by the dint of the judgment of justice P.M Njoroge ELC Judge in Chuka ELC Petition No 5 of 2017 formerly Meru ELC Petition No 14 of 2012 proceeding in this case have been rendered nugatory and they are no longer of any meaningful, legal or jurisprudential value and as such the proceedings should be discontinued by an order of this court.

    2. That by the dint of the judgment of justice P. M. Njoroge ELC Judge in Chuka ELC Petition No 5 of 2017 formerly Meru ELC Petition No 14 of 2012 the canvassed issues in these proceedings have been overtaken by event rendering the entire suit frivolous, vexatious and an abuse of the court process and as such the suit should be struck out.

    3. That by the dint of the administrative action by Purity W. Mwangi for director of land adjudication and settlement pursuant to the judgment of justice P. M Njoroge in Chuka ELC Petition No 5 of 2017 formerly Meru ELC Petition No 14 of 2012 land parcel No 1687 Chiakariga 'B' Adjudication Section is non-in existence (sic) and it is subject to repeat of the

entire Chiakariga 'B' adjudication process and as a consequence further proceedings in this case will be an excise in futility.

4. That the suit was commenced with an invalid consent by Tharaka District Land Adjudication and Settlement Officer pursuant to Section 30 (1) of the *Land Adjudication Act* thus making the entire suit incompetent, bad in law ab initio and the same should be struck out with cost.

5. Costs of this application be provided for.

2. The Application was supported by the affidavit of Silas Kariuki Mitugo the appellant herein, together with the grounds on the face of the Application.

3. The respondent filed grounds of opposition dated 6th December, 2022 in the following terms:

    1. That the application is grossly incompetent, incurably defective and an abuse of the court process.

    2. That the reliefs sought herein cannot issue before the court hears oral evidence to determine the authenticity of the documents referred to in the motion and the affidavits.

    3. That the judgment of the court referred to does not invalidate the respondent's right to his property nor does it confer any right to the applicant.

    4. That the judgment referred to herein was not in persona and therefore cannot be used to defeat the respondent's claim on the land.

4. The respondent prayed for the dismissal of the application with costs.

5. Upon considering the matter, the trial court, in a ruling delivered on 27th April, 2023 dismissed the said application with costs.

6. The appellant was aggrieved by that ruling and filed this appeal on the following grounds: -

    1. That learned Principal Magistrate erred in Law and fact by holding that an invalid, illegal or unlawful consent by the District Land Adjudication and Settlement Officer Chiakariga 'B' Adjudication Section used by the respondent to commence Marimanti ELC Case No 12 of 2017 should be canvassed at the hearing.

    2. The learned trial magistrate erred in Law and fact by holding that Marimanti ELC Case No 12 of 2017 should proceed into hearing when the suit was illegal and unlawful for want of a legal and varied (sic) consent under Section 30 (1) of the *Land Adjudication Act* Cap 284 Laws of Kenya.

    3. The learned trial magistrate erred in Law and fact by holding that the issues of *res judicata* is an issue that requires stay of orders when it is trite that when a matter is *res judicata*, the court lacks jurisdiction to hear and determine the same for the second time.

    4. That the learned trial magistrate erred in law and fact by failing to be bound by a judgment of the Superior Court (High Court) in Chuka ELC Petition No 5 of 2017 formerly Meru ELC Petition No 14 of 2012 (which judgment has never been appealed against) which ordered and directed that all adjudication process in Chiakariaga 'B' Adjudication section was to start afresh.

    5. The learned trial magistrate erred in Law and fact by failing to make a finding that Marimanti ELC Case No 12 of 2017 was a creature of the adjudication process of Chiakariga 'B' Adjudication Section granted that it was commenced through Section 30 (1) of the *Land*

Adjudication Act and such, Chuka ELC Petition No 5 of 2017 formerly Meru ELC Petition No 14 of 2012 made the suit incompetent.

6. The learned trial magistrate erred in Law and fact by dismissing a letter by Purity W. Mwangi for Director Land and Settlement which required a repeat of adjudication process of Chiakariga 'B' Adjudication Section and which directly affected Marimanti ELC No 12 of 2017 the same being a creature of Chiakariga Adjudication process of Chiakariga 'B' Adjudication Section.

7. The learned trial magistrate erred in law and fact in failing to distinguish between striking out a matter for being incompetent, bad in law, frivolous and vexatious and discontinuing of a suit on account of the suit being overtaken by event or the suit being rendered useless on account of a judgment or an intervening factor.

8. The leaned trial magistrate erred in Law and fact by dismissing the appellant's application for failure to quote Order 2 of the *Civil Procedure Rules* which was a mere technicality and in particular noting that Order 51 Rule 10 provides as follows:

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> (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of failure to comply with this rule.
>
> (2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application."

9. That the learned trial magistrate erred in Law and fact by dwelling in technicalities when dispensing justice contrary to the direct provisions of Article 159 (2) (d) of the *Constitution* of Kenya 2010 which provides that, "159 (2) (d) justice shall be administered without undue regard to procedural technicalities."

10. The learned trial magistrate erred in law and fact by delivering a ruling without framing the issues for determination and without giving concise reason for his findings and holding.

7. The appellant proposed that the Appeal be allowed and the ruling of the learned magistrate rendered on 27th April, 2023 be vacated and the same be substituted with an order of this court that the application dated 5th October 2022 is allowed with costs to the Appellant, and that Marimanti ELC Case No 12 of 2017 be struck out with costs to the Appellant.

8. The appeal was canvased by way of written submissions. The appellant filed his submissions dated 23rd November, 2023 through the firm of I.C Mugo & Co. Advocates while the respondent filed his dated 16th April, 2024 through the firm of Murango Mwenda & Co. Advocates.

Appellant's Submissions

9. The Appellant gave a brief background of the matter. It is the Appellant's submission that his first complaint against the ruling of the learned trial magistrate is that the said magistrate erred in law and fact by allowing the respondent to continue with his suit when the consent under Section 30 of the *Land Adjudication Act* that was used to institute the suit was invalid, illegal and unlawful and thus

ousting the jurisdiction of the trial court. The appellant's counsel submitted that it is trite law that a person who has a claim of interest in land in an adjudication section, such person is obligated by the provisions of Section 30 of the *Land Adjudication Act* (hereinafter LAA) to obtain a consent from the District Adjudication and Settlement Officer (hereinafter DLASO) to institute a suit in a court of law. It is the Appellant's submission that failure to obtain such consent from DLASO makes such suit a non-starter and in addition, failure to obtain a valid or lawful consent from DLASO oust the jurisdiction of the court and any proceedings, judgment, ruling, order or decree if made without a valid consent is null and void for want of jurisdiction.

10. The Appellant submitted that the issue of a valid consent was brought to the attention of the trial court. The Appellant further submitted that when a claim is based on "an interest on land" in an adjudication Section, a consent under Section 30 *Land Adjudication Act* is mandatory, and that any proceedings for a claim in an adjudication section which is not served with a consent by DLASO is null and void and a good candidate for dismissal by court.

11. It is the Appellant's submission that jurisdiction is everything and anything made without jurisdiction cannot stand before the law as was the observation made by the court in *Owners of Motor Vessel "Lilians S" v Caltex Oil (Kenya) Limited* [1989]eKLR.

12. The Appellant submitted that the trial magistrate entertained Marimanti PMC ELC Case No 12 of 2017 without a valid consent from DLASO and as such without requisite jurisdiction. That the trial magistrate ought to have downed his tools when that issue of a valid consent from DLASO was raised. It is submitted on behalf of the appellant that the trial court should have first dealt with the issue of jurisdiction for want of consent.

13. The Appellant further submitted that the trial magistrate erred by law by rendering himself that "...the question of illegality of consent of Land Adjudication Officer is one that can be dealt with on merits, not summarily." That the trial magistrate ought to have disposed the issue of illegality before dismissing the appellant's application.

14. The appellant submitted that in Chuka ELC Petition No 5 of 2017 formerly Meru ELC Petition No 14 of 2012, persons in Chiakariga 'B' Adjudication Section who were not satisfied in the manner the process was being conducted by DLASO moved the court through the said petition. The Appellant submitted that at an interlocutory stage, the applicants in the said petition sought for orders of maintenance of status quo and Hon. Justice P. M. Njoroge issued an order for maintenance of status quo dated 15th October, 2012. It is the appellant's submission that the issuance of orders of status quo orders by the learned Judge meant that the adjudication process of Chiakariga 'B' Adjudication Section came to a halt pending the hearing and determination of the petition. The Appellant submitted that Status quo of Chiakariga 'B' Adjudication process was halted by a lawful order of the learned Judge pending the hearing and determination of the petition.

15. It was submitted on behalf of the appellant that any consent by DLASO between 15th October, 2012 when the orders of maintenance of status quo were issued and on 4th July, 2018 when judgment in the petition was rendered would be invalid and unlawful. The Appellant further submitted that issuing of consent by DLASO to commence proceedings in court under Section 30 *Land Adjudication Act* is part of the Adjudication Process and that there was a valid and lawful order which the DLASO intentionally and knowingly breached when one S. K Thiongo on 11th June, 2014 purportedly issued to the respondent a consent to institute a suit in a court of law.

16. It is the Appellant's submission that the then DLASO at the end of the petition, was disqualified by the court to continue with the adjudication process of Chiakariga 'B' Adjudication Section when it

commenced afresh. The Appellant submitted that the lawful orders of maintenance of status quo were obtaining as of 11th June, 2014 and as such the DLASO was in breach of that valid and lawful order of the court when DLASO purported to issue a consent to the respondent with which the respondent used to commence Marimanti PMC ELC Case No 12 of 2017. The Appellant further submitted that the suit was therefore bad in law and a non-starter ab initio and that the trial magistrate ought not to have entertained the suit by the respondent.

17. It is the Appellant's submission that the first ground of appeal is valid and this appeal should be allowed on that ground alone. The Appellant relied on Black's Law Dictionary which define status quo "to be preserved by a preliminary injunction is the last actual peaceable, uncontested status which preceded the pending controversy."

18. It was further submitted on behalf of the Appellant that the trial magistrate fell into error by holding that the issue of *res judicata*, is an issue that requires stay of orders when it is trite that when a matter is *res judicata*, the court lacks jurisdiction to hear and determine the same for the second time. It is the Appellant's submission that he did not raise the issue of *res judicata* in the notice of motion dated 5th October 2022. The Appellant contends that the trial magistrate dealt with extraneous matters when delivering the ruling appealed against by the appellant. That the issue of *res judicata* was a creature and conception of the trial magistrate and one cannot understand why the trial magistrate had to bring in matters of *res judicata* when the appellant had not raised them in the motion dated 5th October, 2022. The Appellant further submitted that the trial magistrate however in his ruling delivered on 27th April, 2023 in his wisdom observed, "whether the matter is *res judicata* is a question that requires stay orders from the Superior Court upshot." The appellant submitted that the trial magistrate fell into error by so holding, granted that when the matter is *res judicata*, it ousts the jurisdiction of the court to hear and determine the matter. The Appellant submitted that the issue of *res judicata* is predicated on the doctrine that the suit must come to an end and when a matter is *res judicata* it cannot be entertained by the court for the issues in the former suit are similar, parties are similar and the court has decided over the suit. That the trial magistrate fell into error by observing that the orders of *res judicata* required stay orders from a superior court. The appellant pointed out that the principle of *res judicata* is found in Section 7 of the *Civil Procedure Act*.

19. The Appellant submitted on ground 4 of the memorandum of appeal which is to the effect that the trial magistrate erred in law and fact by failing to be bound by a judgment of the Superior Court in Chuka ELC Petition No 5 of 2017 (formerly Meru ELC Petition No 14 of 2012) (which judgment he stated has never been appealed against) and which order had directed that all adjudication process in Chiakariga 'B' Adjudication Section was to start afresh. It is the Appellant's submission that there is no doubt that Marimanti PMC ELC Case No 12 of 2017 is in regard to parcel No 1687 Chiakariga 'B' Adjudication Section. That the petition was in regard to Chiakariga 'B' Adjudication Section, and the learned Judge in the Petition directed that the entire process of Chiakariga 'B' Adjudication Section be stopped and the said process be started afresh.

20. The Appellant submitted that Marimanti PMC ELC Case No 12 of 2017 was commenced through DLASO's consent, albeit illegally and unlawfully, issued on 11th June, 2014. It is the Appellant's submission that the suit ought to have been halted as the judgment in the petition was binding on the trial magistrate.

21. The Appellant submitted on the fifth ground of appeal which is to the effect that the learned trial magistrate erred in law and fact by failing to make a finding that Marimanti ELC Case No 12 of 2017 was a creature of the adjudication process of Chiakariga 'B' Adjudication Section granted that it was commenced through Section 30 (1) of the *Land Adjudication Act* and as such, Chuka ELC Petition No

5 of 2017 (formerly Meru ELC Petition No 14 of 2012) made the suit incompetent. It is the appellant's submission that the suit land in Marimanti ELC Case No 12 of 2017 was a creature of Chiakariga'B' Adjudication Section. That the suit in the trial court could not be separated from the adjudication process. The Appellant submitted that the suit land 1687 Chiakariga 'B' Adjudication Section was excised when an order of status quo was obtaining. That the suit land 1687 Chiakariga 'B' Adjudication Section was excised when an order of status quo was obtaining. That the suit land 1687 Chiakariga 'B' Adjudication Section will have to be subjected to fresh adjudication process courtesy of the judgment in the petition delivered on 4th July, 2018. The Appellant argued that it was not good enough for the trial magistrate to contend that the judgment in the said petition did not touch on the suit land.

22. It is the Appellant's submission that the trial court erred in law and fact by dismissing a letter by Purity W. Mwangi for Director Land Adjudication and Settlement which required a repeat of adjudication process of Chiakariga 'B' Adjudication Section and which directly affected Marimanti ELC No 12 of 2017, the same being a creature of Chiakariga 'B' Adjudication Process of Chiakariga 'B' Adjudication Section.

23. The Appellant submitted on ground 7 of appeal which contended that the learned trial magistrate erred in law and fact in failing to distinguish between striking out a matter for being incompetent, bad in law, frivolous and vexatious and discontinuing of a suit on account of the suit being overtaken by events or the suit being rendered useless on account of a judgment or an intervening factor. It is the Appellant's submission that there is no doubt that the judgment in the said petition affected adversely Marimanti ELC Case No 12 of 2017. The Appellant submitted that the judgment in the said petition ordered that the adjudication process in Chiakariga 'B' Adjudication Section be repeated afresh. That the learned trial magistrate did not address himself to the net effect of the judgment in the said petition.

24. With regard to the dismissal of the appellant's application for failure to invoke the provisions of Order 2 of the *CPR*, the appellant submitted that failure to invoke a particular provision of the law cannot be fatal. That even quoting the wrong provision in itself cannot be fatal to a pleading by any party. The appellant argued that, that is only a matter of form, and cited Order 2 Rule 14 *CPR*. The appellant submitted that his intentions and wishes in his pleadings are crystal clear as to what he wanted and failing to cite Order 2 of the *CPR* or any other provisions of the *Civil Procedure Rules* could not be fatal to the appellant's case. That the trial magistrate should not have dismissed the appellant's application dated 5th October 2022 for failure to invoke Order 2 of the *CPR*. The appellant relied on Order 51 Rule 10 of the *Civil Procedure Rules* which provides inter alia, that an application shall not be defeated on a technicality or for want of form that does not affect the substance of the application. The appellant also cited the provisions of Article 159 (2) (d) of the *Constitution* and submitted that the leaned trial magistrate erred in law and fact by dwelling on technicalities when dispensing justice contrary to the said provision of Article 159 (2) (d) of the *Constitution* of Kenya 2010.

25. With regard to ground 10 of the appeal, the appellant submitted that a ruling is almost like a judgment and it should contain facts, issues for determination and analysis and determination thereof. It is the appellant's submission that the trial magistrate did not frame issues for determination and neither did he give reasons for reaching his findings and holdings. The appellant submitted that it is very difficult to understand the reasoning of the trial magistrate in the manner he rendered himself in the ruling. The Appellant relied on Civil Appeal No 139 of 2018 *Jacinta Nduku Masai v Leonida Mueni Mutua & 4 others* [2018 eKLR] and Order 21 Rule 4 of the *Civil Procedure Rules* and submitted that the trial magistrate ought to have dismissed the application with reasons.

26. The Appellant prayed that the appeal be allowed and the ruling of the learned magistrate rendered on 27th April 2023 be vacated and the same be substituted with an order of the court that the application

dated 5th October, 2022 is allowed with costs to the appellant and that PMC Marimanti ELC Case No 12 of 2017 be struck out with costs to the appellant.

Respondent's Submissions

27. The respondent argued grounds 1 and 2 of the appeal jointly and submitted that the two grounds deal with the validity and legality of the consent issued to the respondent by the DLASO pursuant to Section 30 of the *Land Adjudication Act*. It is submitted on behalf of the respondent that his construction of Section 30 is that it donates power to the adjudication officer to issue consent for filing suits in areas where the land is under adjudication and the register has not been closed. That this is a statutory power donated to the DLASO and in granting the consent the adjudication officer was properly seized of the powers.

28. It is the respondent's submission that it is clear from the first two grounds of appeal and prayer 4 in the notice of motion dated 5th October, 2022 that the appellant sought to challenge the validity of the consent dated 11th June 2014 which was issued by the DLASO to the respondent to commence Marimanti ELC Case No 12 of 2017. That the appellant claimed that the decision to issue the consent and the subsequent consent were invalid and illegal in light of alleged orders of maintenance of status quo issued in Chuka ELC Petition No 5 of 2017, and was dissatisfied with the decision of the DLASO in issuing the consent to file the suit and clearly sought to quash the consent when the DLASO was not even a party to the suit to enable him respond to his actions. The respondent submitted that the appellant sought to have the decision of the DLASO and the consent issued nullified and the suit struck out for being an illegality and in essence, was challenging the decision-making process of the DLASO on grounds that the same was illegal and unlawful for allegedly contravening orders of the court.

29. The respondent questioned whether the civil proceedings can be commenced in the Magistrates Court to challenge the decision-making process of a quasi-judicial authority and whether the Magistrate's court has the jurisdiction to quash the decisions of an adjudication officer acting in a quasi-judicial capacity. It is the respondent's submission that it is trite law that where a party is aggrieved by the decision-making process of any authority and seeks to challenge the same, the right procedure is to commence judicial review proceedings seeking an order of certiorari, and cited Order 53 Rule 3 of the *Civil Procedure Rules* which provides that an application for judicial review shall be made to the High Court. The respondent submitted that the magistrate's court has no jurisdiction to entertain proceedings seeking to challenge the decision-making process of an authority. That if the appellant was dissatisfied with the adjudication officer's decision to issue the consent, his option was to have it quashed by the High Court through a judicial review process.

30. The respondent submitted that the ELC Court in Chuka ELC Petition No 5 of 2017 did not quash that decision and did not take away from the Land Adjudication Officer powers to issue consents under Section 30 of the *Land Adjudication Act*.

31. The respondent further submitted that when the court is being asked to dismiss a suit summarily, no evidence is allowed to be adduced as that is the function of the trial court. the respondent relied on the case of *D.T Dobie & Co. Ltd v Joseph Mbaria Muchina* (1982) KLR.

32. The respondent submitted and urged the court to find that the legality and validity of the consent issued by the adjudication officer could not be challenged at an interlocutory stage. That, that is a matter that could be dealt with in court during the trial and not through a summary process. The respondent relied on the case of *Oruta & another v Nyamato* (1988) eKLR.

33. The respondent further submitted that having obtained the requisite consent to file the suit as required by law, the consent could only be queried at the trial but not by application to discharge it, otherwise

the provision of the Act providing for obtaining the consent would be rendered nugatory. That the trial magistrate was right in holding that the matter could be dealt at the hearing of the suit.

34. The respondent pointed out that in a ruling delivered on 10th December, 2014, the ELC Court set aside the orders of 15th October 2014 on maintenance of status quo. That in setting aside the said orders the court explained that the order was vague and the status quo had not been clearly spelt out. The respondent further pointed out the said ruling was in respect to an application dated 26th November, 2014 by the Attorney General seeking to set aside the orders given on 15th October 2021 which was allowed and the orders of maintenance of status quo were set aside. That there was no basis for the appellant to interpret the order of status quo to the effect that it included restraining the DLASO from issuing consents since the court itself was clear that the status quo was not clearly defined. The respondent submitted that the order of status quo did not restrain the DLASO from issuing consent to file suits, and urged the court to find that consent by the adjudication officer for institution of the suit was legal and is therefore valid. That the trial court was right in finding that the issue of the illegality of the Land Adjudication Officer was one that could be dealt with on merits, not summarily.

35. With regard to ground 3 of the appeal in which the appellant faults the trail court for holding that the issue of *res judicata* is an issue that requires stay of orders when it is trite that when a matter is *res judicata* the court lacks jurisdiction to hear and determine the same for the second time, and the appellant's submission that he did not raise the issue of *res judicata* in his application dated 5th October, 2022 and therefore the trial court dealt with extraneous matters when delivering the ruling, the respondent submitted that the appellant double speaks when he states that he did not raise the issue of *res judicata* and then again states that *res judicata* means that the suit must come to an end. That it is laughable for the appellant to fault the trial court for considering an issue that was never raised in the application and at the same time suggest that the issue ought to have been dealt with in his favour by striking out or dismissing the suit.

36. It is the respondent's submission that even assuming that the issue of *res judicata* was not raised in the application, the trial court's reference to the issue could have been an error that did not occasion any injustice upon the appellant. The respondent relied on the case of *Harrison Wanjohi Wambugu v Felista Wairimu Chege & another* (2013) eKLR in which the Court of Appeal cited with approval, the words of Madau J. A. in *Belinda Murai & others v Arnos Wainaina* (1978) LLR 2782 (CALL).

37. The respondent submitted that it may be true to say that the issue of *res judicata* was never raised in the application, but such error, which may have occurred due to inadvertence, error or genuine mistake, does not warrant the dismissal of the respondent's claim and locking out the respondent from being heard on merit. It is the respondent's submission that the concern and duty of the court at all times is to do justice to all the parties who appear before it. The respondent urged the court to pay fidelity to substantive justice and find that the trial court's consideration of the issue of *res judicata* did not in any way occasion injustice to the appellant and that substantive justice cannot be achieved by allowing this appeal on that ground and locking out the respondent from proceeding with the suit on merit on that basis.

38. The respondent submitted that grounds 4 and 5 of appeal deal with effect of the judgment in Chuka ELC Petition 5 of 2017 on the validity of Marimanti PM ELC 12 of 2015. That the appellant stated that the judgement of the superior court was binding upon the trial court and required the adjudication process in Chiakariga 'B' to start afresh. The respondent further submitted that it is the appellant's contention that the trial court ought to have found that Marimanti PM ELC 12 of 2015 was a creature of the adjudication process of Chiakariga 'B' Adjudication Section considering that it was commenced through Section 30 of the Act and therefore the judgement made the suit before court incompetent.

39. It is the respondent's submission that the judgement of the court in Chuka ELC Petition 5 of 2017 did not take away the respondent's constitutional right to approach court for reliefs. That nowhere did the judgment state that no suits could be filed in respect of Chiakariga 'B' Adjudication Section and that suits that had been filed should be discontinued. The respondent submitted that even then, the court had to look at the issues dealt with in the said petition and decide on their relationship to and effect on the suit before it. That this could only be done by hearing and determination of the suit on merit, and that the trial court rightly ordered that the suit proceeds for hearing on merits. The respondent argued that those two grounds must fail.

40. With regard to ground 6 of the appeal in which the appellant avers that the trial court erred by dismissing a letter by Purity W. Mwangi for DLASO which required a repeat of the adjudication process of Chiakariga 'B' Adjudication Section and which directly affected ELC No 12 of 2017, the respondent submitted that this is an attempt by the appellant to mislead the court. That a cursory glance at the ruling of the trial court shows that the trial court did not dismiss the said letter but only ordered that the matter proceeds on merits. That the trial court could not interrogate the contents of the alleged letter at an interlocutory stage. The respondent submitted that the Adjudication referred to by the appellant was an item of evidence. That the said document had to be subjected to due process for the court to apply its judicial mind and form a judicial opinion on its contents. The respondent relied on the case of *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* (2015) eKLR. It is the respondent's submission that the trial court ought to have interrogated the authenticity of the letter which could only be done once the said letter was tendered in evidence in court. That the appellant was asking the court to proceed on assumption that the letter written by the Director of Land Adjudication was genuine and without affording the respondent an opportunity to challenge its authenticity and validity.

41. The respondent submitted that courts of law do not decide cases on assumptions and that evidence must be tendered and subjected to due process. That the letter was allegedly written in 2020, some 6 years after the consent was given by the adjudication officer and therefore the trial court was right in holding that the suit proceeds for hearing on merit.

42. It is the respondent's submission that even assuming that the letter was written by the alleged officer, he is of the view that the said letter did not invalidate the consent issued by the DLASO. That the Director of Land Adjudication has no powers to overturn a consent granted by the DLASO pursuant to Section 30 of the *Land Adjudication Act*. The respondent argued that under Section 3 (3) of the *LAA*, only an appeal to the minister can obtain by a party who is aggrieved by a refusal to grant consent by the adjudication officer or by the High Court in a judicial review process. The respondent submitted that the trial court was right in ordering that the matter proceeds on merits and therefore that ground of appeal must fail.

43. Regarding ground 7 of the appeal in which the appellant faults the trial court for allegedly failing to distinguish between striking out a matter for being incompetent, bad in law, frivolous and vexatious and discontinuing of a suit on account of the suit being overtaken by events or the suit being rendered useless on account of a judgment or an intervening factor, the respondent submitted that the appellant is attempting to mislead the court when he states that he only sought discontinuance of the suit. The respondent referred to prayers 2 and 4 and submitted that the appellant cannot accuse the trial court of failing to distinguish between discontinuing a suit and striking out a suit when he expressly sought to have the suit struck out. The respondent urged the court to dismiss that ground of appeal.

44. With regard to grounds 8 and 9 wherein the appellant states that the trial court erred by dismissing the appellant's application for failure to quote Order 2 of the *Civil Procedure Rules* which was a

mere technicality and in particular quoting Order 51 Rule and alleges that the trial court dealt with technicalities rather than substantive justice, it is the respondent's submission that it is undisputed that the appellant's application dated 5th October, 2022 was expressed to be brought under Section1 & 1A, 3 & 3A of the *Civil Procedure Act*. That a cursory glance at the prayers sought in the said application depicts that what the applicant sought in essence was the striking out of the plaint and that it then follows that the application was premised on the wrong provisions of the law and therefore was completely incompetent.

45. The respondent submitted that striking out of pleadings is covered by Order 2 of the *Civil Procedure Rules*. That if the applicant intended to ask the court to strike out the plaint, then he should have brought the application within the ambit of Order 2 of the *Civil Procedure Rules* in which he ought to have based his application on one or any of the grounds set out therein. That it is clear that the appellant's skirting about on reliefs sought was meant to help him to escape the provisions of Order 2 of the *Civil Procedure Rules*. That the reliefs sought by the appellant were ambiguous and unclear. The respondent submitted that the overriding objective should not be seen as a panacea to aid a party who flagrantly violates the rules of the court. That the appellant's application was completely incompetent and the oxygen principle should not be invoked to save it. The respondent relied on the case of *Ramji Devji v Joseph Oyula* Eldoret Civil Appeal (Application) No 154 of 2010, *City Chemist (Nbi) & another v Oriental Commercial Bank*, Civil Appl. Nai. 30-2 of 2008 and *Dishon Ochieng v S.D.A Church, Kodiaga* Civil Appeal (Application) No 333 of 2010.

46. The respondent submitted that parties should not be allowed to simply waive the *Constitution* and statutory provisions hoping to exterminate their defaults and cure the incompetence in their pleadings. The respondent contended that it can only be termed as a matter of mere technicality if the appellant only omitted to quote the relevant provisions of the law in his motion. That this is not a mere technicality since the appellant in his submissions filed in respect of the application did not address the court on the provisions of Order 2 of the *Civil Procedure Rules* despite expressly seeking striking out. That this cannot be termed as a technicality that can be cured by oxygen principle. The respondent submitted that the appellant cannot be a genuine seeker of justice yet seek to violate tenets of justice. That justice looks at both sides of the highway. The respondent relied on Section IB (1) (a) of the *Civil Procedure Act* that calls upon the court to handle all matters presented before it for the purpose of attaining the just determination of the proceedings. The respondent also cited Section 3A of the *Civil Procedure Act*.

47. It is the respondent's submission that dismissing, discontinuing and/or striking out the suit would be tantamount to contravention of the respondent's constitutional right to a fair hearing anchored in Article 50 (1) of the *Constitution* of Kenya 2010. The respondent relied on the case of *Richard Nchapi Leiyagu v IEBC & 2 others* Civil Appeal No 18 of 2013.

48. The respondent submitted that it is the duty and concern of the court to deliver justice and justice cannot be achieved by dismissal, discontinuance and/or striking out of suits without hearing and determination on merit. That he is of the view that no harm or prejudice will be occasioned on the appellant if the suit proceeds for hearing since he will have the opportunity to present his defence. That there was and there is no risk of fair trial of the suit. The respondent urged the court to find that the suit was substantially heard and the application was brought in bad faith and intended to shield the appellant's evidence from scrutiny. The court was urged to find that the trial court was properly guided when it ordered that the matter should proceed for hearing on merit.

49. With regard to ground 10 in which the appellant faults the trial court for delivering a ruling without framing the issues for determination and without giving concise reasons for its finding and holding, it was submitted on behalf of the respondent that the trial court clearly justified its finding. That the

trial court clarified that the issues raised by the appellant are matters that could be dealt with during the hearing of the matter. The court was urged to dismiss the appeal with costs as it lacks merit.

Analysis And Determination

50. I have perused and considered the record of appeal, the grounds of appeal, the submissions made and the authorities. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyze the evidence on record to determine whether the conclusions reached by the learned magistrate were justified on the evidence presented and the law.

51. The appeal herein is against the ruling of the trial court which dismissed the appellant's notice of motion application dated 5th October, 2022. The said application was said to be brought under Section 1A and 3A of the *Civil Procedure Act* and Order 51 Rule 1of the *Civil Procedure Rules*. In the said application, the applicant sought the following orders:

    1. That by dint of the judgment of Justice P.M. Njoroge ELC Judge in Chuka ELC Petition No 5 of 2017 formerly Meru ELC Petition No 14 of 2012 proceeding in this case has been rendered nugatory and they are no longer of any meaningful, legal or jurisprudential value and as such the proceeding should be discontinued by an order of this court.

    2. That by dint of the judgment of Justice P.M. Njoroge ELC Judge in Chuka ELC Petition No 5 of 2017 formerly Meru ELC Petition No 14 of 2012 the canvassed issues in these proceedings have been overtaken by event rendering the entire suit frivolous, vexatious and an abuse of the court process and as such the suit should be struck out.

    3. That by dint of the administrative action by Purity W. Mwangi for director of Land Adjudication and Settlement pursuant to the judgment of Justice P.M. Njoroge ELC Judge in Chuka ELC Petition No 5 of 2017 formerly Meru ELC Petition No 14 of 2012 Land Parcel No 1687 Chiakariga 'B' Adjudication Section is non in existence (sic) and it is subject to repeat of the entire Chiakariga 'B' adjudication process and as a consequence further proceeding in this case will be an exercise in futility.

    4. That the suit was commenced with an invalid consent by Tharaka District Land adjudication and settlement officer pursuant to Section 30 (1) of the *Land Adjudication Act* thus making the entire suit incompetent, bad in law ab initio and the same should be struck out with cost.

    5. Cost of this application be provided for.

52. The issues for determination in this appeal as I can deduce from the grounds of appeal are:

    i. Whether the failure to cite Order 2 of the *Civil Procedure Rules* was fatal to the application.

    ii. Whether the trial magistrate delivered a ruling without framing the issues for determination and without giving concise reasons for his findings and holding.

    iii. Whether the appellant's application dated 5th October 2022 is merited or not.

    iv. Whether the appeal has merit.

53. In the application dated 5th October, 2022, the appellant mainly sought to have the respondent's suit discontinued and/or struck out by dint of the judgment in Chuka ELC Petition No 5 of 2017 (formerly Meru ELC Petition No 14 of 2012) and for being commenced pursuant to an alleged invalid consent by the Tharaka District Land Adjudication and Settlement Officer under Section 30 (1) of the *Land Adjudication Act*. The application was brought under Section 1, 1A and 3A of the *Civil*

Procedure Act and Order 51 Rule 1 of the *Civil Procedure Rules*. In his short ruling dated 27th April, 2023, and which is the subject of this appeal, the learned trial magistrate stated as follows:

> "Application to struck (sic) suit is disallowed as provision of law employed is incorrect, Order 2 ought to have been employed. Further, question of illegality of consent of Land Adjudication Officer is one that can be dealt with on merits, not summarily.
>
> Whether the matter is *res judicata* is a question that requires stay orders from the Superior Court upshot.
>
> Application by defendant/applicant is dismissed with costs.
>
> Matter to proceed on merits, expeditiously."

54. Order 2 Rule 15 of the *Civil Procedure Rules* provides as follows:

15

(1) At any stage of the proceedings the court may order to be struck out or amended any pleadings on the grounds that: -

a. it discloses no reasonable cause of action or defence in law; or

b. it is scandalous, frivolous or vexatious; or

c. it may prejudice, embarrass or delay the fair trial of the action; or

d. it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on application under sub-rule (1) (a) but the application shall state concisely the grounds on which it is made.

55. It is clear from the provisions of Order 2 Rule 15 that in moving a court to strike out a pleading under Sub-rule (1), the party must specifically elect whether he/she is invoking part (a), (b), (c) or (d) as the circumstances under which they may be applied are different and not contingent to each other with the result that the court will determine the application based on the part relied on. In order for a pleading to be struck out under any of those provisions, the court has to consider different requirements of the law as the reasoning applied thereof is not uniform, but will depend on the particular ground cited or invoked. It is my view therefore that the appellant ought to have cited Order 2 Rule 15 of the *Civil Procedure Rules*. Whereas the failure to cite a relevant provision may not be fatal to an applicant's cause, I believe it was necessary in this case that the relevant provision was cited since the court had to determine the application based on whichever ground of Order 2 Rule 15 was cited. It therefore follows that the learned trial magistrate was correct in disallowing to strike out the suit on that ground.

56. Regarding the issue whether the learned magistrate delivered a ruling without framing the issues for determination and without giving concise reasons for his findings and holding, I note that the trial magistrate gave reasons, albeit in a summary form, for dismissing the application. It is my opinion and I so find that the failure to frame issues did not materially affect the ruling as the trial court proceeded to give reasons for the orders issued though in a brief manner.

57. The last issue to consider is whether the appellant's application dated 5th October, 2022 is merited and whether or not the appeal has merit. As already stated, the application was seeking to strike out the suit by dint of a judgment in Chuka ELC Petition No 5 of 2017 as well as an alleged invalid consent issued pursuant to Section 30(1) of the *Land Adjudication Act*. The principles upon which a court acts in

considering applications to strike out pleadings are well settled. In *Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu* (2009) eKLR, the court of Appeal stated as follows:

> " The principles guiding the court when considering such an application which seeks striking out of a pleading is now well settled. Madan JA (as he then was) in his judgment in the case of *D.T Dobie & Company (Kenya) Ltd v Muchina* (1982) KLR, discussed the issue at length and although what was before him was an application under Order 6 Rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principle which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:
>
> > "The power to strike out should be exercised after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case."

58. It has also been held that the power to strike out a pleading which ends up in driving a party from the judgment seat should be used very sparingly and only on cases where the pleading is shown to be untenable. It is trite law that the jurisdiction to strike out a pleading must be exercised sparingly and in clear and obvious cases, and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit or defence tried by a proper trial. The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a mini-trial thereof before finding that a case or defence is otherwise an abuse of the court process. The overriding objective to be considered in an application for striking out a pleading is whether it raises any triable issues.

59. The appellant prayed for the respondent's suit to be struck out because of the decision made in Chuka ELC Petition No 5 of 2017 and on the basis that the suit was commenced on an invalid consent. I have perused the pleadings in the record of appeal. Taking all the circumstances of this case into consideration, I am not persuaded that the justice of the case would have been attained by terminating the respondent's suit against the appellant at the interlocutory stage. Under Article 50(1) of the *Constitution*, every person has the right to have any dispute that can be resolved by the application of the Law decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body. Under Article 25, that right cannot be limited. Whereas I agree that the form of a hearing does not necessarily connote adducing oral evidence, and that in appropriate cases hearing may take the form of affidavit evidence, to determine a suit such as this by way of affidavit evidence ought to be resorted to only in clear and plain cases. In this case, the trial court (and this court) is being invited to conduct a mini-trial and interpret the documents annexed to the appellant's affidavit in support of the application seeking to strike out the suit and make a determination and have the suit struck out.

    I am not satisfied that the present case can be termed as clear and plain and the learned trial magistrate was right in declining to strike out the suit.

60. Considering the totality of the material availed in this case, and applying the legal principles outlined in law, I am satisfied that the learned trial magistrate was justified in arriving at the decision he made and I find no basis to interfere with his finding and holding.

61. In the result, I find no merit in the appellant's appeal and the same is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 25TH JULY, 2024

In the presence of:

Court Assistant – Kiruja

Murango Mwenda for Respondent.

No appearance for I. C. Mugo for Appellant

C.K YANO,

JUDGE