



Mutungi & 4 others v Kinangop Farmers Self Help Group – (Sued through its officials Peter Kamau Kamanga (Chairman) Josephat Mwaniki Gitau (Secretary) Shadrack Mwai Mbugua (Treasurer) (Environment and Land Appeal 13 of 2024) [2024] KEELC 5704 (KLR) (Environment and Land) (25 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5704 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL 13 OF 2024
MC OUNDO, J
JULY 25, 2024
(FORMERLY NAKURU ELC APPEAL NO. E39 OF 2022)

BETWEEN

NICHOLAS WACHIRA MUTUNGI 1ST APPELLANT
JAMES NJIHIA MWATHI 2ND APPELLANT
JAMES MACHARIA NDUNGU 3RD APPELLANT
CHARLES KAMAU MUCHAI 4TH APPELLANT
GEOFFREY PAUL KAMAU 5TH APPELLANT

AND

**KINANGOP FARMERS SELF HELP GROUP – (SUED THROUGH
ITS OFFICIALS PETER KAMAU KAMANGA (CHAIRMAN) JOSEPHAT
MWANIKI GITAU (SECRETARY) SHADRACK MWAI MBUGUA
(TREASURER) RESPONDENT**

(Being an Appeal from the Ruling of Hon. Nathan Shiundu Lutta, Chief Magistrate made on 30th November, 2022 in the Chief Magistrate’s Court at Naivasha ELC Case No. 89 of 2018)

JUDGMENT

1. What is before me for determination on Appeal is a matter in which the Hon. Nathan Shiundu Lutta, Chief Magistrate upon considering an Application dated the 4th July 2022 filed by the Respondents herein seeking judgment in the terms proposed in the subdivision of land Gilgil/Gilgil Block 1/16155



(Kikopey) to be allocated to the Plaintiffs/Appellants, vide his Ruling dated 30th November, 2022, allowed the said Application, in the spirit of expeditious disposal of the case and the greater justice for all parties.

2. The Appellants, being dissatisfied with the Ruling of the trial Magistrate have now filed the present Appeal based on the following grounds in their Memorandum of Appeal:
 - i. That the learned trial Magistrate erred in law and in fact by allowing the Application granting final orders without allowing the Appellants an opportunity to be heard on the main suit.
 - ii. That the learned trial Magistrate erred in law and in fact by failing to consider that the Appellant had filed an application to amend the Plaint which was pending before the court.
 - iii. That the learned trial Magistrate erred in law and in fact by relying on the account of the Respondent and ignoring the findings of the Learned Judge in ELC Appeal No. 30 of 2019.
 - iv. That the learned trial Magistrate erred in law and in fact by failing to hold that the Respondent's Application was fatally defective for seeking to conclude the matter without hearing of the main suit.
 - v. That the learned trial Magistrate occasioned a miscarriage of justice by adopting a procedure of not doing a hearing but accepting submissions
3. The Appellants thus sought that the instant Appeal be allowed and the Lower Court's Ruling be set aside. They also sought that the said Ruling be substituted by an order dismissing the entire Application and/or allowing the Appellants to proceed with the main suit. That further, the Appellants be granted the costs of the present Appeal and that the court grants any other relief that it deemed fit and just.
4. The Appeal was admitted on 9th October, 2023 and directions issued for the same to be disposed of by way of written submissions.

Appellants' submission

5. The Appellants vide their written submissions dated 31st October, 2023 summarized the factual background of the matter before framing one issue for determination to wit; whether the Appellants are entitled to the reliefs sought in the Appeal.
6. Their submission was that the trial Magistrate had caused a great injustice to them by allowing the Respondent's Application which had in effect denied them their constitutionally granted right to be heard as per the rules of natural justice. Reliance was placed in the decided case of Justice Amraphael Mbogholi Msagha v Chief Justice of the Republic of Kenya & 7 others [2006] eKLR.
7. That by the impugned ruling, the trial Magistrate had entered judgement in the main suit without hearing their case thus the same was not only unjust but unfair to them. That further, the trial Magistrate had placed much emphasis on the Respondent's submissions thereby ignoring their own submissions. That the averments that had been made by the Respondent in its Application had been misleading as the orders that had been sought therein had been in form of a consent that had been forced down the Appellants' throat hence the impugned ruling should be set aside for violation of the rules of natural justice.
8. That the learned Magistrate had also ignored the other Plaintiffs who were in the process of being joined to the instant suit wherein an Application for Amendment of the Plaint had been filed before



- the delivery of the impugned ruling. The impugned ruling had thus denied the intended parties who were entitled to be part of the present suit, fair hearing.
9. That vide its ruling dated 18th November, 2019 there had been interim orders in place that had restrained the Respondents from interfering with the suit property wherein the impugned ruling herein had purported to allow the subdivision of the suit property despite the same having been halted pending the hearing and determination of the main suit.
 10. That the orders sought by the Respondents had not only been untenable and unjust but also the amounted to corruption and maleficence that had been visited upon the Appellants.
 11. Their submission was that the Application dated 4th July, 20122 was fatally defective for seeking final orders. That the said Application had offended the *Civil Procedure Act* and Rules and also that by failing to adhere to the rules of natural justice and diverting from lawful procedure, wherein the impugned ruling had occasioned a great miscarriage of justice. That the Application ought to have been dismissed so as to allow the suit to proceed to its logical conclusion.
 12. They sought for the Appeal to be allowed, the ruling dated 30th November, 2022 be set aside and substituted by order dismissing the entire application so as to allow the Appellants to proceed with the hearing of the main suit. They also sought for costs of the Appeal.

Respondent's Submissions.

13. In response to the Appellants' Appeal and in opposition thereto, the Respondent vide his written submissions dated 4th January, 2024, gave a brief history of the matter in question as evidenced in the trial court and then affirmed the ruling and findings of the learned trial Magistrate to the effect that the trial court had properly handled the issues before it and in the interest of justice made a fair and proper determination in the circumstances thus the Appellants' Appeal was unjustified and unmerited.
14. On the right to be heard, the Respondent submitted that whereas it was true that every party who came before the court deserved to be heard, the Appellants seemed to have a misapprehension of what that right entailed since the Appellants had been heard and justice done. That the Appellants were served with the Application dated 4th July, 2022 in which they filed their Response and Submissions which the court had duly considered. That further, the Appellants who were the Plaintiffs in the trial court had aerated their case in the Pleadings and documents which they had filed and which had been responded to by the Respondent's Pleadings and documents in the trial court. That subsequently, the Application dated 4th July, 2022 had been predicated on the very contentions of the Appellants and the Respondent's responses to the same hence the application and all the documents in support and opposition thereto had been heard as required to give justice swiftly and efficiently.
15. That being heard did not require that witnesses be called to stand and sworn in accordance with their faith and have questions put to them but that the position of a party be sufficiently aerated and considered in a manner that enabled the court dispense justice. Reliance was placed in the decided case of Peter Kilonzo Kioko v Monarch Insurance Co. Ltd; Kisakwa Ndolo King'oku (Sued as Legal Representative of the Estate of Mwanja Kisakwa - Deceased (Interested Party) [2021] eKLR, where the court cited the court of Appeal decision in Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229 to submit that the court would note that the prayers that had been made in the Plaint as filed in respect to the Appellants had actually been allowed hence insistence on being heard further was an abuse of the court's process as it was merely seeking to use judicial time and process to achieve other mysterious and ulterior purposes.



16. That in determining the Application dated 4th July, 2022, the court was not obligated to consider the issues in the Application for the Amendment of the Plaint being that the issues for determination before the court had not been for dismissal or striking out of the suit but for allowing of the same.
17. That the Respondent had clarified that it intended to comply with the Appellants' demands as long as the reasonable conditions had been made and that upon the court considering the same, it had found that the said conditions had been reasonable hence it allowed the Respondent's Application dated 4th July, 2022. That in any case, the Appellants had not demonstrated how the said conditions may have been unreasonable or how they would have been denied justice should judgment be entered in the suit on the conditions that had been spelt out in the application dated 4th July, 2022 and the ruling dated 30th November 2022, neither had they demonstrated before the trial court or in the instant Appeal how the hearing of the application to join many others would have affected the granting of the prayers that had been made in the Plaint adverse.
18. That in the contrary, the other persons who may, or may not be interested in seeking remedy against the Respondent had not been shut out since whether they would be let in to the instant suit by way of the Application dated 1st November, 2022 or they come to court on their own, they would be heard on their own interests. That further, the prayers in the Plaint had been to the effect that each person be given their own share of the suit property and not a block of land for a group of people.
19. Regarding the assertion that the subdivision had been stopped and/or that the orders of the ELC Court in ELCCA No. 30 of 2019 had been contravened, the Respondents explained that the Ruling dated 13th November, 2019 upon which the Appellants had based their assertion that no subdivision should be done on the suit property, had been the basis of the Appeal filed by the Defendants in Nakuru ELCCA No. 30 of 2019 wherein a judgement had been delivered. That the effect of the said judgement had been that the ruling dated 13th November, 2019 was without basis as the court had already rendered itself in its ruling dated 18th September, 2019 where it had determined the Application before it dated 16th November, 2018. That the said Application had not sought to prevent subdivision and that the court had become *funtus officio* in respect to the application as there had not been an application to move it to review its own ruling or make a correction. That the ruling dated 18th September, 2019 which had not restrained subdivision had not been interfered with.
20. That in fact, it would not have made sense to prevent subdivision when the prayers in the Plaint had been that the Respondent excise and give the Appellants their share and that it would not have been possible to determine the Plaintiffs' share or excise the same without undertaking subdivision. That further, the Appellants had not raised the issue before the trial Magistrate but had obliquely referred to the Judgement in Nakuru ELCCA No. 30 of 2019 by saying that it had affirmed the ruling dated 18th September 2019 which was a correct position as the issues had already been settled.
21. That the allegation that the Respondent, or the trial Magistrate had gone against the orders of the court or the judgement in Nakuru ELCCA No. 30 of 2019 had no basis in law or in fact and so were the allegations that the subdivision had been against the orders of the court.
22. In conclusion, the Respondent submitted that the trial Magistrate's ruling had determined the issues before him and enabled justice to be dispensed swiftly and efficiently thus minimizing the costs for the parties. That the instant Appeal sought to reverse the same and keep the parties endlessly embroiled in litigation for no discernible reason. That the instant Appeal was unmerited, an abuse of the court's process, and ought to be dismissed with costs.



Determination.

23. I have considered the record of Appeal, the Ruling by the trial Magistrate, the written submissions by learned Counsel and the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the decision Appealed against assess, it and make my own conclusions. See the case in *Selle vs. Associated Motor Boat Co. Ltd.* [1968] EA 123.
24. According to the proceedings herein, the Appellants instituted suit against the Respondents herein vide a Plaint dated 16th November 2018 seeking that the Respondents do transfer and issue them with title deeds for their shares to be excised from Land parcel No. Gilgil/Gilgil Block 1/16155 (Kikopey) which measured approximately 521.47 hectares and in the alternative, the Executive officer of the court to be empowered to execute all necessary documents to effect the transfer. They had further sought for costs and any other order that the court would deem fit to grant.
25. Subsequent to the filing of the suit the Respondent herein had filed its application dated 4th July 2022 seeking that the Appellant's herein be registered as proprietors of parcels of land they were in occupation for reason that at the time the suit was filed, subdivision of the mother land had not been completed and therefore it had been difficult to identify individual members' share and or entitlement. The Affidavit in support of an equal date had been sworn by one Christopher Kagocha Waikwaini.
26. The Appellant had opposed the Application via their undated Replying Affidavit to the effect that the deponent of the supporting affidavit was a stranger, that the mother land had been subdivided way back in 1983 wherein balloting and survey had been done in 1984 and they had taken possession and occupation of the respective parcels of land measuring approximately three acres. That the application had not settled the issues raised in the Plaint as there were members yet to be joined to the suit.
27. The Application was disposed of by way of written submissions pursuant to which the trial learned Magistrate delivered the impugned ruling on 30th November 2022 in the following terms.

“I have read the application, replying affidavit and submissions of the parties and I am of the considered view that the main issue for determination is whether the court should allow the application and enter the judgment as prayed.

I have read the plaint and I note that the plaintiffs sought for an order requiring the defendant to transfer and issue the plaintiffs with title deeds to their share to be excised from parcel of land known as Gilgil/Gilgil Block 1/16155 (Kikopey) the defendant applicant has proposed the portions to be allocated to the plaintiffs and submitted that the title deeds will be processed once the plaintiffs submit the necessary documents and pay the requisite fees.

In the spirit of expeditious disposal of cases and the greater justice of all parties I allow the defendant's application.”
28. I have considered the said ruling herein and find that the trial Magistrate had rightly confirmed that the said application had been a proposal by the Respondents on the portions to be allocated to the Appellants herein. However having noted that there had been different position taken by the Appellants, in their replying affidavit, the trial court ought to have rejected the said proposal and given the Appellants an opportunity to be heard, now that the contested Application had sought to prematurely compromise the suit in its finality.
29. A consent Judgment or order is meant to be the formal result and expression of an agreement already arrived at by the parties to the proceedings embodied in an order of the Court. The fact of its being so



expressed puts the parties in a different position from the position of those who have simply entered into an ordinary agreement and is enforceable while it stands.

30. Having carefully considered the record as put to me, the impugned ruling and orders, the rival submissions of learned counsel for the Appellants and for the Respondents, the cited authorities and the law, I find that the impugned ruling was made without sufficient material facts to resolve the matter. I have therefore reached the inescapable conclusion that it would be in the interest of justice to set aside the ruling of 30th November 2022 so that the matter can proceed for a full trial as to give the Appellants an opportunity to be heard on merit.

The Appeal herein succeeds with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 25TH DAY OF JULY 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

