



**Abulwa v Abulwa & 5 others (Environment and Land Appeal
E004 of 2023) [2024] KEELC 6162 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6162 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL E004 OF 2023**

E ASATI, J

SEPTEMBER 19, 2024

BETWEEN

RAYMOND SAMWEL ABULWA APPELLANT

AND

NELIAH INDOSIA ABULWA 1ST RESPONDENT

GRACE ORADO 2ND RESPONDENT

DORIS ABULWA 3RD RESPONDENT

MARY ABULWA 4TH RESPONDENT

PRISCA ABULWA 5TH RESPONDENT

PAULINE ABULWA 6TH RESPONDENT

*(Being an appeal from the ruling of Hon. R. M. Ndombi (PM) delivered
on 16th November 2023 in Vihiga PMC EL case No E041 OF 2023)*

JUDGMENT

1. Vide the Memorandum of Appeal dated 20th March, 2023 the Appellant herein Raymond Samuel Abulwa, appealed against the Ruling of Hon. R. Ndombi (Principal Magistrate) delivered on 16th November, 2023 in Vihiga Pmc El Case No. E041 OF 2023. He sought for orders that the appeal be allowed and the Ruling set aside with costs and that the costs of the appeal be borne by the Respondents.
2. The grounds of appeal as contained in the Memorandum of Appeal are that;
 - i. The learned Magistrate erred in law and fact when she allowed the Respondents' Notice of Motion dated 4th August, 2023.



- ii. The learned Magistrate erred in law and fact when she disallowed the appellant’s Preliminary Objection dated 16th August, 2023.
 - iii. The learned Magistrate erred in law and fact when she failed to hold that the Respondents’ Notice of Motion dated 4th August, 2023 was *res judicata*.
 - iv. The learned Magistrate erred in law and fact by determining an interlocutory application which had already been heard and determined by Hon. S.O. Ongeri (SPM) in respect to the same issue and by the same parties herein.
 - v. The learned Magistrate erred in law and fact by ruling that the Respondents’ Notice of Motion dated 4th August, 2023 had merit despite the fact that the court had become functus officio with regard to interlocutory applications owing to the first ruling delivered by Hon. S.O. Ongeri (SPM) on 24th July, 2023 in respect to the Respondent’s earlier Notice of Motion dated 27th June, 2023.
 - vi. The learned Magistrate erred in law and fact by failing to hold that prayer 2 of the Respondents’ Notice of Motion dated 4th August, 2023 had already been overtaken by events.
 - vii. The learned Magistrate erred in law and fact by determining a substantive issue at the preliminary stage, thereby violating the Appellant’s constitutional right to fair hearing.
3. A brief background to the appeal as can be gathered from the Record of Appeal is that the appellant is the 1st Defendant and the Respondents, the Plaintiffs in an ongoing suit namely; Vihiga Pmc El Case No. E041 Of 2023 (herein referred to as the suit). In the pendency of the suit, the 1st Respondent herein (the 1st Plaintiff in the suit) filed an application vide the Notice of Motion dated 4th August, 2023 seeking for an order that pending the hearing and determination of the suit, the court be pleased to issue a mandatory injunction to allow the 1st Plaintiff to access the family house situation on E/ Bunyore/IboOna/1281 limited for the purpose of staying/residing in her parents/family house”.
 4. In reply to the application, the applicant filed a Replying Affidavit sworn by him on 22nd September, 2023 and a Preliminary Objection dated 16th August, 2023. The record shows that both the application and Preliminary Objection were heard simultaneously by the trial court which vide the ruling dated 16th November, 2023 found that the application had merit and allowed it as prayed. The trial court found that the Preliminary objection lacked merit and dismissed it with costs. It is the ruling dated 16th November, 2023 that is the subject of this appeal.
 5. The substantive issue that arises for determination in the appeal is whether or not the trial court erred in dismissing the preliminary objection and in allowing the application dated 4th August, 2023 as prayed.
 6. This being a first appeal, this court reminds itself of the duty to re-examine and re-analyze the evidence placed before the trial court with a view to arrive at independent conclusion and thus determine whether the findings of the trial court are consistent with the evidence and the applicable law. In *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR the court held that:

“this being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”



7. The record of appeal shows that the application was based on the grounds that on 2nd August, 2023, unknown persons working in cohorts with the 1st Defendant (appellant herein) broke into the family house situated on E./ Bunyore/IboOna/1281 which incident was reported to Luanda police station. That the family house is a separate house in the compound which belongs to the Interested Party and has been the parties' home where their late mother was buried. That on 24th July, 2023, the court delivered the ruling vide which it declined to issue a temporary order of injunction on the grounds that the order sought had been overtaken by events. That consequently, the 1st Plaintiff remained evicted from the family house and particularly her parents' house which is situated on the 1st Defendant's (appellant herein) land No. E. Bunyore/IboOna/1281.
8. That the 1st Plaintiff who is a person with disability has been left destitute and that the family house and the 1st Respondent's property were being stolen, vandalized and destroyed.
9. The application was supported by the contents of the Supporting Affidavit sworn by the 1st Respondent on 4th August, 2023 and annexures thereto.
10. The Preliminary Objection dated 16th August, 2023 raised by the appellant was on the grounds that the trial court lacked jurisdiction to hear and determine the application dated 4th August, 2023 as there existed a ruling made over the same issue raised in the application hence the application offended the mandatory provisions of Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya and that hence the application was an abuse of the court process.
11. Vide the contents of his Replying Affidavit sworn on 22nd September, 2023, the appellant opposed the application stating that the order sought in the application dated 4th August, 2023 was one of the orders sought in an earlier application filed by the applicant which application was determined vide the ruling delivered on 24th July, 2024.
12. The record shows that the trial court considered the application and vide the ruling found that the prayer in the application before her was for a mandatory injunction to allow the 1st Plaintiff back to the family home. The court held;

“this I find to be a new prayer thus *res judicata* cannot apply. If the family are in talks of hiving off fourth parcel for family home where else would be good apart from the sport where family house exists. I find that the application is merited. The same is allowed as prayed. The preliminary objection lacks merit the same is dismissed with costs.”
12. The appellant's complaint as contained in the grounds of appeal is that the ruling was erroneous as the application dated 4th August, 2023 was *res judicata* in view of the ruling in the same case made on 24th July, 2023.
13. *Res judicata* is a doctrine of law based on section 7 of the Civil Procedure Act whose ingredients are that:
 - i. the matter in issue has been directly and substantively in issue in a former suit
 - ii. that the former suit must have been between the same parties or parties under whom they claim
 - iii. that the parties must be litigating under the same title
 - iv. the issues must have in a court of competent jurisdiction to try the subsequent issue
 - v. and that the matter has been heard and finally decided by such court.



14. I have considered the ruling dated 24th July, 2023 which was in respect of an application dated 26th June, 2024. The prayers sought in the application dated 26th June, 2023 was that the court may order the OCS Luanda police station to facilitate the entry of the 1st Plaintiff/Applicant back into their family home situated on land parcel No. E. Bunyore/IboOne/1281}}. The trial court considered the application, found that some prayers had been overtaken by events as the plaintiff had already been evicted from the suit property and proceeded to grant an order of injunction prohibiting the selling, leasing or charging of the suit property pending the hearing and determination of the suit.
15. The ruling was made in the same suit so the parties and the subject matter and the same. It has not been denied that a ruling dated 24th July 2023 exists. The former application sought to have the 1st Respondent restored to what was described in the application as the family house. It is the same relief that was sought in the application that resulted in the ruling the subject of the appeal. All the ingredients of re judicata were demonstrated. The prayers in the application dated 4th August, 2023 concern issues that the court had already determined. The only avenue available to the applicant was to seek review of the orders made on 24th July, 2023 or challenge the same on appeal.
16. I find that the ruling of the trial court dismissing the preliminary objection and allowing the application was erroneous. What needs to happen is expeditious disposal of the main suit either by way of Alternative Justice System (AJS) or any other suitable Alternative Dispute Resolution Mechanism acceptable to the parties, given that the parties are close family members, or expeditious hearing of the suit by the trial court.
17. I find that the appeal has merit and hereby allow it as follows:
 - i. The ruling dated 16th November 2023 in Vihiga Pmc El Case No E041 OF 2023 allowing the 1st Respondent's application dated 4th August 2023 and dismissing the appellant's preliminary objection dated 16/8/2023 is hereby set aside and substituted with an order allowing the preliminary objection and striking out the 1st Respondent's application dated 4th August 2023 with no order as to costs.
 - ii. Each party to bear own costs of the present appeal.Orders accordingly.

JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED THIS 19TH DAY OF SEPTEMBER, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Court Assistant- Ajevi

R. Okumu for the Appellant.

No appearance for the Respondents.

