



REPUBLIC OF KENYA



**William v Juma & another (Land Case Appeal E040 of 2023)
[2024] KEELC 7265 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7265 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
LAND CASE APPEAL E040 OF 2023
SM KIBUNJA, J
OCTOBER 30, 2024**

BETWEEN

CLERAH MBODZA WILLIAM APPELLANT

AND

MBARAK OMAR JUMA 1ST RESPONDENT

RAPHAEL NGONYO SIRYA 2ND RESPONDENT

(Being an appeal against the ex-parte ruling and or order of the learned Hon. Magistrate, Ms. Maureen Nabibya, SPM, made in Mombasa on 17th November 2023 upon the Appellant's application dated 16th November 2023, in Civil (MCELC) No. E830 of 2023 (Mombasa))

JUDGMENT

1. The appellant, being dissatisfied and or aggrieved by the ex parte ruling and or order of the learned magistrate, Hon. Maureen Nabibya, SPM, of 17th November 2023 on the appellant's application dated 16th November 2023 in Mombasa CM ELC NO.E830 of 2023, preferred this appeal through the memorandum of appeal dated 20th November 2023, on the following four grounds:
 - a. "That the learned magistrate erred in law and in fact by not appreciating that the appellant was condemned unheard contrary to the provisions of Article 50 of the Constitution and by not certifying the appellant's application urgent as well as not issuing any favourable orders, the appellant stands to continue suffering irreparable loss and damage and rendered homeless, as she has been evicted from her property, the suit premises herein, being a portion of land described as provisional sub-division No. 419, measuring approximately 105 feet by 50 feet within plot No. 350/11/MN, situate at Barawa, Utange in Bamburi within Mombasa County.
 - b. That the learned magistrate erred in law and fact by not appreciating the fact that the appellant may lose her property, the suit premises herein, being a portion of land described as provisional



sub-division No. 419, measuring approximately 105 feet by 50 feet within plot No. 350/11/MN, situate at Barawa, Utange in Bamburi within Mombasa County, which she bought on 28th November 2014, as the respondents herein may sell and or transfer the suit premises to a third party(ies) as a result of the refusal to certify the application as urgent and giving a faraway date of 31st January 2024, which is about two and a half months away.

- c. That the learned magistrate erred in law and fact by failing to appreciate the fact that the consent judgement recorded and or adopted by the court has far reaching adverse effects and by refusing to certify the appellant's application and giving a faraway inter parties date of 31st January 2024, in effect meant shutting the door for the application of the rule of law and the principles of natural justice.
- d. That the learned magistrate erred in law and fact by refusing to issue any favourable orders to preserve the subject matter of the suit."

The appellant therefore seeks for "the appeal to be allowed in that the appellant's notice of motion application dated 16th November 2023 filed in Civil (MCELC) No. E830 of 2023 (Mombasa) and the orders sought therein be allowed and or granted and thus the ex-parte ruling and or orders made on 17th November 2023, be set aside."

2. The appeal was filed contemporaneously with the notice of motion under certificate of urgency dated 20th November 2023, which was placed before me on 21st November 2023. That upon perusing the pleadings filed, I noted from their headings that they were meant to be filed before "in The High Court Of Kenya At Mombasa, In The Environment And Land Court Division." I directed the application to be mentioned before me on 22nd November 2023, for counsel to address me on which court the pleadings were meant for. On the 22nd November 2023, counsel for the appellant/applicant reported that the initial appeal had been filed before the High Court and upon being struck out, they filed the current appeal mistakenly carrying the same heading of the High Court. The counsel apologised for the error and informed the court they had filled a supplementary affidavit sworn on 21st November 2023 by the appellant with the proper heading, explaining the confusion. I have found it necessary to capture this issue because this court is not a division, but a court of equal status to the other courts at its level. Parties, whether represented or not, have a responsibility to ensure they approach the correct court by making sure their pleadings are properly headed before commencing the filing process, to avoid unavoidable delays and confusion.
3. The court gave directions on filing and exchanging submissions on the appeal on the 11th April 2024 and 15th May 2024. The learned counsel for the appellant and 2nd respondent filed their submissions dated the 16th July 2024 and 30th April 2024 respectively, which the court has considered.
4. The following are the issues for the determination by the court:
 - a. Whether the appellant has shown the learned trial magistrate erred in fact and in law in failing to certify her application 16th November 2023 as urgent, and to issue the ex-parte orders sought to preserve the subject matter of the suit.
 - b. Who pays the costs of the application.
5. The court has carefully considered the grounds on the appeal, submissions by the learned counsel, superior courts decisions cited thereon, the record of appeal, and come to the following findings:
 - a. That the suit before the trial court was commenced by the 1st respondent against the 2nd respondent through the plaint dated the 19th July 2023, seeking for permanent injunction and



eviction orders in respect of “mansionette located at Barawa Utange Area Mombasa County on a plot measuring 105ft by 50ft.” The 2nd respondent entered appearance in person through the memorandum of appearance dated the 25th July 2023, and on the 26th July 2023, the parties filed a consent letter dated the 26th July 2023, to the effect that the defendant/2nd respondent be restrained from interfering with the suit property, and to vacate in seven days or be evicted. That from the parties’ pleadings before the lower court and submissions in this appeal, the consent between the respondents was adopted on the 31st August 2023. That the applicant moved the trial court vide her notice of motion under certificate of urgency dated the 16th August 2023 seeking for:

1. “That this application be certified as urgent and the plaintiff’s and defendants’ presence be dispensed with in the first instance.
2. That the proposed interested party/applicant herein be enjoined onto this suit as a defendant and be allowed to file responses to the plaintiff’s suit and claim.
3. That this honourable court be pleased to stay any further proceedings in the matter and specifically the execution of the consent judgment and or decree recorded or adopted herein on 31st August 2023 and or consequential orders in respect of the suit premises, being a portion of land described as provisional sub-division No.419, measuring approximately 105 feet by 50 feet within plot No. 350/11/MN, situate at Barawa, Utange in Bamburi within Mombasa County, pending the hearing and determination of this application.
4. That this honourable court be pleased to set aside the consent judgment and or decree recorded and or adopted herein on 31st August 2023, and or consequential orders made herein in respect of the suit premises, being a portion of land described as provisional sub-division No.419, measuring approximately 105 feet by 50 feet within plot No. 350/11/MN, situate at Barawa, Utange in Bamburi within Mombasa County.
5. That this honourable court be pleased to order for the reinstatement of the proposed interested party/applicant back to her property, the suit premises herein, being a portion of land described as provisional sub-division No.419, measuring approximately 105 feet by 50 feet within plot No. 350/11/MN, situate at Barawa, Utange in Bamburi within Mombasa County, forthwith and that the OCS of Kiambeni Police Station be directed to confirm compliance with the orders pending hearing and determination of the application and or the suit.
6. That as there is involvement of Beyond Auctioneers in this matter, there be an order restraining the sale and or transfer of the suit property, being a portion of land described as provisional sub-division No.419, measuring approximately 105 feet by 50 feet within plot No. 350/11/MN, situate at Barawa, Utange in Bamburi within Mombasa County, pending the hearing and determination of this application and or suit.
7. That the plaintiff be directed and or ordered to amend his plaint, adding the proposed interested party/applicant as a defendant in the matter to enable her file the aforementioned responses and or defence(s) and the matter to proceed for hearing on merit.
8. That costs of this application be borne by both the plaintiff and defendant herein in any event.”



The application is predicated on the eleven (11) grounds on its face and supported by the affidavit of Clerah Mbodza William, the appellant, sworn on 16th November 2023, inter alia deposing that she is the lawful owner of the suit premises having bought it from Thabu Kaingu Kimeri on 28th November 2014; that with the defendant/2nd respondent, who is her husband, they constructed the masonette where she has been living with their two children, as the defendant lives in the United States of America; that they were evicted from the suit premises on the 14th November 2023, on orders issued in the suit, rendering her and her child homeless; that she instructed her advocates to make the application seeking for the court’s intervention and an opportunity to be heard.

- b. The trial court’s typed proceeding that is page 71 of the record of appeal confirms that when the above appellant’ application was presented before Hon. M. Nabibya, SPM, on the 17th November 2023, the learned trial magistrate made the following order:

“It is hereby ordered:

1. That the application is not certified urgent.
2. That it be served for inter parties hearing on 31/1/2024 before the trial court.”

This is the order that aggrieved the appellant leading to the filing of this appeal. This being a first appeal, the court must evaluate afresh the evidence adduced before the lower court, and arrive at its independent conclusions. In the case of *Mursal & Another versus Manese (suing as the legal administrator of Dalphine Kanini Manesa)* (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022) (Judgment), while citing with approval the case of *Santosh Hazari versus. Purushottam Tiwari (Deceased)* by L. Rs {2001} 3 SCC 179 the court held as follows:

“A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.”

It is trite the appellate court should not interfere with the discretion of the trial court, unless where after re-evaluating the evidence afresh it comes to different findings or where it is apparent the trial court misdirected itself on the facts and applicable law or where the discretion was not exercised judiciously. In this instance, the trial court relied on affidavit evidence when giving the order of 17th November 2023. This court will rely on the same affidavit evidence, just like the trial court did.

- c. Though the learned counsel have in their submissions addressed themselves to factual materials outside those before the trial court as on 17th November 2023, like the depositions in the 2nd respondent’s/defendant’s replying affidavit that evidently was filed later, this court will confine



itself to the matters of facts before the court as of the date of the order. That should include what the 1st respondent, 2nd respondent and the appellant had filed as of 17th November 2023.

- d. The appellant's affidavit sworn on the 16th November 2023, had annexed to it invitation agreement form, receipt, copies of two certificates of birth, affidavits of Caroline M. Chirume, Harriet Tatu Iddi, and Kazungu Kirao Baya, among others, and from the totality of their contents, the court notes the appellant's application was certainly urgent, and deserved to be considered to be heard on priority basis and or some ex parte order(s) to be issued to safeguard the substratum of the suit. That even though the orders of 17th November 2023, do not set out any reasons for the decisions thereof, and in view of the apparent urgency disclosed in the application dated the 16th November 2023, I find the learned trial magistrate erred in facts and in law by failing to certify the application as urgent, and to consider issuing prayers (3) and (6) in the interim pending the inter parties hearing and determination of the application.
 - e. That as the appellant's application dated the 16th November 2023 is yet to be heard inter parties by the trial court, the application will be remitted back to the lower court for hearing and determinations on priority basis. I would have considered issuing prayers (3) and (6) in the interim, but due to the time that has lapsed from the date of filing the application to date, the court orders the parties to continue maintaining the status quo that was ordered by this court on the 29th November 2023, pending the hearing and determination before the trial court.
 - f. Section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya provides that costs follow the events unless where otherwise ordered for good reasons. In this appeal, I find it fair and just that the costs abide the outcome of the suit before the trial court, in view of the apparent relationship between the appellant and 2nd respondent.
6. Flowing from the above determinations in this appeal, the court finds and orders as follows:
- a. That the appeal is partially allowed in the following terms:
 1. That the learned trial magistrate's ruling/order of 17th November 2023, on the appellant's/applicant's notice of motion dated the 16th November 2023, is hereby set aside.
 2. That the appellant's/applicant's notice of motion dated the 16th November 2023, is certified urgent and to be heard inter parties on priority basis, by the trial court where it is hereby remitted for hearing and determination.
 3. That the costs in the appeal to abide the outcome of the suit before the trial court.Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 30TH DAY OF OCTOBER 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Appellant : Mrs Chengo for Kenga

Respondents : Mr. Owino

Leakey – Court Assistant.

