Karanja v Mruu (Environment and Land Appeal E38 of 2022)
[2024] KEELC 13672 (KLR) (9 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13672 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT AND LAND APPEAL E38 OF 2022

FM NJOROGE, J

DECEMBER 9, 2024

BETWEEN

BONIFACE KARANJA ..... APPELLANT

AND

JOSHUA NDURE MRUU ..... RESPONDENT

(Being an appeal from the RULING and ORDER of the Hon. J.M. KITUKU PM, in KILIFI ELC CASE NO. 33 OF 2019- JOSHUA NDURE MRUU v BONIFACE KARANJA given on 2ND NOVEMBER, 2022)

JUDGMENT

Background

1. The background to the present appeal is as follows: by an originating summons 3/2/2021 filed on his behalf by Omulama E.M & Co advocates, the respondent herein sued the appellant seeking the following orders:

    1. That the originating summons herein be served on the respondent herein by way of substituted service through advertisement in our (sic) local daily newspapers with nationwide circulation;

    2. That the respondent interests in parcel of land situated in Kilifi County registered as Title No Kilifi/Mtwapa/783 measuring approximately five point four hectares (5.4 Ha) have been distinguished(sic);

    3. That the Registrar of Titles Kilifi do delete entries in favour of the respondent and/or 3rd parties in the title of land (sic) described in paragraph 2 above or register appropriate discharge in respect thereof;

    4. That the applicant herein Joshua Ndure Mruu be registered forthwith as the proprietor of all the parcel of land situated in Kilifi County registered as Kilifi Mtwapa /783 measuring

approximately five point four hectares (5.4 Ha) in the names of the plaintiff Joshua Ndure Mruu (sic) without gazettement;

5. That an order be granted directing the Land Registrar Kilifi to reconstruct the records of parcel of land situated in Kilifi County, registered as Kilifi Mtwapa /783 measuring approximately five point four hectares (5.4 Ha) without gazettement;

6. That the Land Registrar Kilifi do proceed and remove if any caution /restriction/caveat/order registered forthwith and without gazettement and thereafter do proceed and comply with the orders herein accordingly;

7. That the Registrar of Titles Kilifi County do issue a title deed for the parcel of land situated in Kilifi County and be hereby ordered to reconstruct file records for the parcels (sic) of land situated in kilifi county known as (sic) registered as Kilifi Mtwapa /783 measuring approximately five point four hectares (5.4 Ha) without gazettement;

8. That the orders referred to in paragraphs 2,3,4,5,6, and 7 above be registered against the title to property known as Kilifi Mtwapa /783 measuring approximately five point four hectares (5.4 Ha) in terms of Section 38(2) of the Limitation (sic) Actions Act Chapter 22 Laws of Kenya;

9. That the costs of this originating summons be provided for.

2. A motion dated 26/5/2022 was filed by the appellant through Mogaka Omwenga & Mabeya Advocates. The motion sought inter alia an order to restrain the Land Registrar Kilifi from transferring charging and/or dealing in any way with Plot No Kilifi/Kijipwa /783 pending the hearing and determination of the application inter partes, an order restraining the County Government of Kilifi from interfering with the records of ownership of Plot No Kilifi Kijipwa /783 pending the hearing of the application inter partes; that the entire proceedings and the entire decree of the court dated 15/2/2022 be set aside unconditionally; that the entire suit of the plaintiff be struck out with costs for want of pecuniary jurisdiction and/or in the alternative the defendant be allowed to defend the suit unconditionally; that the Land Registrar Kilifi be ordered to cancel all entries from no 4 in the green card and the defendant's title be restored as it was prior to 12/4/2022; that the costs of the application be granted to the defendant. As grounds for his application the appellant alleged non-service of summons upon him, attempts by the respondent to dispose of the suit land, value exceeding the pecuniary jurisdiction of the trial court and misrepresentations by the respondent. The application was supported by the sworn affidavit of the appellant dated 26/5/2022.

3. A ruling was delivered on that motion on 2/11/2022. The learned magistrate identified the following two issues for determination:

   a. Whether the defendant was served with the Originating Summons;

   b. Whether the court should set aside the judgment (ex parte)?

4. The learned magistrate noted that leave for substituted service had been granted to the respondent on 5/8/2021; that the matter proceeded to a hearing by viva voce evidence after the court was satisfied that service had been effected; that the appellant did not dispute service and that the conclusion therefore was that he was served with the pleadings and therefore the ex parte judgment entered was regular. He consequently exercised his discretion and issued orders setting aside the judgment delivered on 15/2/2021 and allowing the defendant to defend the suit unconditionally, and to file a response to the originating summons within 14 days, and an order restraining the respondent from dealing with the suit property in any manner adverse to the appellant until the suit was heard and determined.

5. The present appeal was generated by that ruling.

Determination

6. In the appeal the appellant has presented the following as his grounds of appeal:

    a. The learned magistrate erred in law and in fact by failing to allow prayers 3, 5,7, and 7 of the appellant's motion;

    b. The learned magistrate erred in failing to find that the court did not have the requisite pecuniary jurisdiction to hear the matter;

    c. The learned magistrate erred in finding that it (sic) had jurisdiction to continue to hear the matter whose value is Kshs 47,500,000/=;

    d. That learned magistrate erred in not awarding costs to the appellant;

    e. The learned magistrate misdirected himself on the applicable principles of law by failing to take into consideration and appreciate the submissions and authorities submitted to the court by the appellant.

7. In summary, the appeal herein is primarily an expression of dissatisfaction with the learned magistrate's decision's

    a. failure to restrain the County Government from interfering with the suit land;

    b. failure to strike out the suit with costs for want of pecuniary jurisdiction or

    c. in the alternative allowing the appellant to defend the suit unconditionally and failing to grant the appellant costs of the motion.

8. A plain reading of the orders issued in the impugned ruling shows that it is correct that the learned magistrate never gave orders to restrain the County Government from interfering with the suit land. He only restrained the respondent.

9. It is the observation of this court that prayer no 2 was also not granted in finality as in its very drafting, it was expressed to be sought only pending inter partes hearing of the application which is now fait accompli. The same case applies to prayer no 3: it was also sought pending only hearing inter partes.

10. In such circumstances this court can not understand why the appellant now wants those prayers to be granted in the present appeal while their subsistence, if at all they were granted, was not to last beyond the inter partes hearing of the application they were sought in.

11. In any event, the County Government was not a party to the suit hence prayer no 3 seeking orders against it was thus incompetent. The law is that orders can not be issued against a person who has not been joined to proceedings.

12. Regarding costs, it is trite that costs follow the event under Section 27 of the CPA but also that the court has discretion to make an appropriate order regarding costs. The Learned magistrate was not silent on costs; he stated that costs should be in the cause. Considering that some of the prayers in the appellant's application had not been successful, this court finds that there was no error in the magistrate in ordering costs to be in the cause.

13. Regarding prayer 6 in the application, the same sought an order as follows:

> " That the Land Registrar Kilifi be ordered to cancel all entries from no 4 in the green card and the defendant's title be restored as it was prior to 12th April 2022."

14. In this court's view, the court did not allow that order for an obvious reason: the prayer was in the form of a mandatory injunction. The established rule is that mandatory injunctions ought not be issued except in rare circumstances where the respondent has attempted to steal a march on their adversary (see the case of: Locabail International Finance Limited - Versus - Agro Export and others (1986) All ER 906).

15. In another case it was observed that "…. if mandatory injunction is granted on motion, there will be normally be no question of granting a further mandatory injunction at the trial…" (See Shepard Homes – Versus – Sandham (1970) 3 WLR Pg. 356.) Besides, the grant by the magistrate of prayers no 4 and 5 had the effect of casting the gladiators in the present combat back into the arena of conflict, and it would have been improper to have substantive and final orders issue in the nature of mandatory injunction. I think the learned magistrate was right in denying prayer no 6 since he also came to the appellant's aid by granting an order restraining the respondent from interfering with the suit land pending hearing and determination of the suit where he thought that all parties would be able to prove their cases.

16. If the respondent were to prove their case and the register was still having the impugned entries, it would be unnecessary to order any changes to the register. Then the matter would rest just there. However, that would not be the case perchance the appellant were to secure orders in his favour only to find that the entries in the register had been altered. The refusal to grant prayer 6 was thus in the appellant's aid.

17. I think by the foregoing I have already dealt with ground 1 in the memorandum of appeal in so far as it relates to prayers nos 3, 5, and 7 of the application.

18. It is not however correct for the appellant to allege that he was not allowed to defend the suit unconditionally; he was. This court's understanding of the application is he had sought under prayer no 5 as an alternative prayer to the striking out of the suit, that he be allowed to defend the suit unconditionally; that an alternative prayer may be granted in lieu of a juxtaposed prayer. It is thus this court's view that prayer no 5 was satisfactorily granted and the alternative limb in that prayer can not be revisited in the present appeal.

19. Prayer no 4 was also granted in that the learned magistrate set aside the ex parte judgment entered on 15/2/2021.

20. Ground no 3 in the appeal is a complaint to the effect that the learned trial magistrate erred in finding that the court had jurisdiction to continue to hear the matter whose value was above Kshs 20,000,000/-. This court has partially addressed this ground herein above while addressing prayer no 5 regarding alternative prayers. In this court's view, the prayer for striking out for want of pecuniary jurisdiction was quite presumptuous. It assumed, inter alia, that the prayer for setting aside must succeed.

21. The inclusion of presumptuous prayers amounts to a lottery that is impermissible in litigation.

22. The prayer for setting aside, as I have stated before cast the parties back into the arena where they could raise substantive issues. I find that in the turbulence of an application for setting aside where one party already holds a position higher than the other by way of being in possession of judgment or other orders, substantive issues such as jurisdiction and contested matters of fact should give way to the main procedural issue as to whether the judgment can be set aside to pave the way for a re-

hearing of the matter; they should be raised substantively in a settled and serene litigation environment in which parties are on an equal footing after the setting aside. Setting aside applications should only delve into the procedural issues and not substantive issues, lest they unwittingly metamorphose into appeals against a court's own judgment or order. It is only after the setting aside, when the court has become properly seized of the substantive issues for determination again, that the court ought to pronounce itself on such substantive matters. In that regard, it is this court's holding that the learned trial magistrate was not obliged to delve into the issue of jurisdiction or grant. The foregoing disposes of grounds nos 2 and 3 in the memorandum of appeal.

23. From such correct findings as he made as seen herein above, this court fails to see how the learned trial magistrate can be said to have misdirected himself on the applicable principles of law. Regarding whether he followed the submissions and authorities supplied by the appellant, it has been held that these only play the role of support cast in the theatre of determination of disputes before court.

24. To illustrate past court perspectives on the issue, I will quote the case of Benson W. Kaos & 72 others v Attorney General & 85 others [2022] eKLR as follows:

> " 21. Additionally, Ngang'a & Another vs. Owiti & Another [2008] 1 KLR (EP) 749, the Court held that: "As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

25. And in the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR it was held as follows:

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

26. It is therefore not possible for this court to hold either that the trial magistrate failed to take into consideration the submissions and authorities of the appellant or that he erred in failing to appreciate the same.

27. The upshot of the foregoing is that the appeal before this court lacks merit and it is hereby dismissed with costs.

JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 9TH DAY OF DECEMBER, 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.