Tengecha v Kerich (as legal administrator of the Estate of Paul Kerich Bor (Deceased) (Environment and Land Appeal 32 of 2019) [2023] KEELC 103 (KLR) (19 January 2023) (Judgment)

Neutral citation: [2023] KEELC 103 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND APPEAL 32 OF 2019

FM NJOROGE, J

JANUARY 19, 2023

BETWEEN

NELSON K TENGECHA ..... APPELLANT

AND

ESTHER CHEPKURUI KERICH (AS LEGAL ADMINISTRATOR OF THE ESTATE OF PAUL KERICH BOR (DECEASED) ..... RESPONDENT

JUDGMENT

1. This is a judgment in respect of an appeal brought by way of a memorandum of appeal dated 20/12/2018 against the judgment and decree of Hon Samuel Wahome, C.M., in Molo CMCC No 217 of 2014. The appellant seeks that the ruling and order issued on 11/12/2018 be set aside and judgment and decree issued on 27/9/2018 be set aside to facilitate proper hearing of the matter on merit. He also seeks costs of the appeal.

2. The background of the present appeal is that on 9/10/2014 the respondent filed Molo CMCC No 217 of 2014 against the appellant seeking a permanent injunction restraining the appellant or his agents from interfering with plot number 53 within Keringet Township, a declaration that Paul Kerich Bor whose estate she represents is the sole owner of that plot, an eviction order costs of the suit and any other further relief the court deemed fit to grant. Her claim in the body of the plaint was that that her late husband purchased the suit land from one David Masusu Buch Arap Malel; that upon her late husband's demise the appellant who is her brother in law without any colour of right trespassed onto the suit land and took possession thereof and denied the respondent access thereto and he should therefore be evicted.

3. In the lower court case the appellant filed his defence on 18/12/2014. He denied the claim that the plaintiff's husband had purchased the suit land as alleged and stated categorically that he is not a trespasser thereon. He averred that he purchased the suit land from David Masusu Buch Arap Malel on

various dates in the years 1989 and 1990 upon which he paid the entire purchase price of Kshs. 10,000/=; that the respondent's husband never contributed to that purchase price and that the appellant had taken possession of the land and connected utilities thereto and is still in possession.

4. The respondent filed a reply to defence on 20/1/2014 denying all the claims made in the defence and reiterating the contents of the plaint.

5. The suit was heard on 29/5/2018 when the respondent and her one witness testified in the absence of the defendant. Judgment was delivered on 27/9/2018 in the absence of the appellant and the respondent but in the presence of the respondent's counsel. The lower court in that judgment issued a permanent injunction against the appellant and his agents restraining them from interfering with the suit land and eviction order as well as costs of the suit. The appellant then filed an application dated 24/10/2018 seeking a stay of execution of the judgment and a setting aside of the judgment and proceedings to allow the appellant defend the suit. The court declined the orders sought hence the appeal now before this court.

6. The appeal against the main judgment was filed outside the statutory 30 days and extension of time was required. There is no application for extension of time to appeal against the main judgment of the lower court in the matter and I do not consider it properly before the court and I hereby strike the portion of appeal before me as concerns the main judgment dated 27/9/2018. I am now left with the portion of the appeal against the ruling and order dated 11/12/2018 which I consider as an appeal properly before me as it was filed only 9 days after the ruling was delivered.

7. The present appeal is premised on eleven grounds but in so far as that appeal against the ruling dated 11/12/2018 is concerned the relevant grounds are grounds no. 1 2, 3, 8, 9, and 10. In this court's view these grounds can be condensed into the following:

    a. Whether the learned trial magistrate erred in fact and in law in failing to hold that the appellant was not aware of the hearing date and could not attend the hearing;

    b. Whether the learned trial magistrate erred by failing to consider that there was no evidence that the appellant had deliberately failed to attend court or sought to delay the hearing;

    c. Whether the learned trial magistrate erred by failing to observe the principles of natural justice with regard to the appellant;

    d. Whether the magistrate erred by failing to note the sensitivity of the dispute in that the dispute was about land and involved a family to which extent he should have ensured a hearing of all sides;

8. Regarding the first and second issues listed above, it is noteworthy that one of the main grounds at the foot of the application was that the appellant was unaware of the hearing date as he was allegedly not given that information by his advocate, yet he had been always ready to proceed with the hearing. In his supporting affidavit he stated that he only learnt of the determination of the case when the respondent visited the suit land claiming to have won the case, whereupon he perused the court file and found that the suit had been heard; that his advocate informed him that his office had been swerved but due to the pressure of work he had been inadvertently omitted to inform the appellant of the hearing date or to attend court. He stated that the failure to attend court was not intentional or calculated to prejudice the respondent in any manner.

9. In her response the respondent in her replying affidavit dated 7/11/2018 stated that the appellant's advocate was served with a hearing notice and acknowledged receipt. However, in both the original lower court record and in the record of appeal her affidavit lacks any exhibit showing that service was

effected. I have perused through the rest of the original lower court record and I have not found any affidavit of service. Should this court then rely on the mere statement by the appellant that the hearing notice was served?

10. I find it odd that the appellant should admit to having been served through his advocate while such a notice is not in the court file. The advocate has filed any affidavit showing service, but it is noteworthy that his services have been terminated by the appellant. This court has no independent evidence to ascertain that indeed service was effected, but since the appellant has admitted something that is adverse to his own case, this court must presume that it is true that no one can testify falsely against his own case, and consequently it must be held to be true that the appellant's erstwhile advocate was indeed served with a hearing notice; that is remarkable candour! In this regard this court must also observe that there is nothing in the respondent's affidavit that would also entitle this court arrive at the conclusion that once the appellant's erstwhile advocate was served he notified the appellant of the hearing date.

11. The foregoing are matters that the lower court failed to address in its ruling dated 11/12/2018. This court is therefore inclined to believe the applicant when he states that his advocate not only received the hearing notice but also inadvertently failed to inform him of the hearing date and also omitted to attend hence the ex parte hearing. This court is also unable to conclude that from the evidence that the absence of the appellant and his advocate at the hearing of the suit was deliberate.

12. Regarding the third issue as to whether the learned trial magistrate erred by failing to observe the principles of natural justice with regard to the appellant I find that he did.

13. In the ruling on the application the learned trial magistrate not only failed to find that there was no evidence that the appellant had deliberately failed to attend court but went further to make very prejudicial observations in relation to the substance of the judgment. He stated that the entire evidence turns on the evidence of PW2 who testified that he sold the suit property to the respondent's husband. The learned trial magistrate misdirected himself by failing to appreciate that natural justice involves giving all parties a chance to give their version of the facts before the adjudicator considers the presentations and gives a decision in the matter, and that in coming to the impugned decision before him he had not heard the evidence in chief of the appellant or any cross-examination of the respondent and her witness.

14. With respect I must state that the learned trial magistrate's conclusion that the applicant has not shown any other evidence to controvert PW2's evidence was grossly erroneous since the appellant had not been heard at the hearing and also that kind of controverting evidence could not have been competently canvassed in an application for setting aside such as the one he was handling at the time. His finding that the application for setting aside was meant to delay justice was also not underpinned by any strong evidence from the respondent or from any references to the court record. The appellant must also succeed on this ground.

15. The last ground is that the magistrate erred by failing to note the sensitivity of the dispute in that the dispute was about land and involved a family to which extent he should have ensured a hearing of all sides. Ordinarily justice is deemed to be blind and should not distinguish between statuses in order to favour some sets of litigants over other sets of litigants. The last ground suggests a differential treatment for matters involving family members but this court thinks that not all cases involving land or family should be handled with kid gloves.

16. Ordinarily all matters whether involving land or family or not however sensitive ought to be dealt on their merits. However, there are categories of matters such as those involving family members which courts normally recommend conciliation under the court's watch or application of alternative justice systems out there.

17. This courts' deferential treatment of family matters is simply borne out of constitutional underpinnings in that Article 45 provides that the family is the natural and fundamental unit of society and the necessary basis of social order and shall enjoy the recognition and protection of the State (which includes the judicial system.) It would not be proper to say that every breach of procedure by a litigant should be completely overlooked simply on account of the fact that the adversary is a family member, for there are instances in which the magnanimity of the court will be totally abused by litigants whose family bonds may have totally evaporated and substituted by a tormentor spirit out to harass their adversaries by feigning procedural lapses ad infinitum.

18. It is however in the present case the fact that no such overt mala fides has been demonstrated in respect of the appellant. I must also observe that whether his defence holds water or not, the appellant must be credited for having readied his own defence for the hearing by complying with the *Civil Procedure Rules*. This, supplemented by the fact that he and the respondent are relatives, was his strongest point which ought to have been considered by the learned trial magistrate as he dealt with the setting aside application before him. However, he never did so and I think this was in error.

19. I think I have stated enough. There is sufficient material before this court in this appeal to entitle the court to reverse the decision of the learned trial magistrate in the application dated 24/10/2018. Consequently, I allow the appeal against the ruling and order of the learned trial Magistrate dated and issued on 11/12/2018 and I hereby substitute the same with an order of this court allowing the application dated 24/10/2018 in terms of prayer no. 3 thereof. The appeal against the main judgment is hereby struck out summarily for the reasons stated earlier in this judgment. The proceedings of 29/5/2018 and the judgment of the lower court dated 27/9/2018 are hereby vacated and set aside. The suit in Molo CMCC No 217 of 2014 shall be remitted back to the lower court for hearing de novo before any magistrate other than Hon Samuel Wahome, C.M. Each party shall bear their own costs of the present appeal. The Deputy Registrar of this court shall transmit the physical lower court file for Molo CMCC No 217 of 2014 as soon as practicable to that court station for the implementation of the above orders.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 19TH DAY OF JANUARY, 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU