Kebongimichurus v Trustees of Legions of Mary & another (Environment and Land Appeal 5 (E004) of 2021) [2023] KEELC 16644 (KLR) (29 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16644 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND APPEAL 5 (E004) OF 2021

FO NYAGAKA, J

MARCH 29, 2023

BETWEEN

JOSEPH KEBONGIMICHURUS ..... APPELLANT

AND

TRUSTEES OF LEGIONS OF MARY ..... 1ST RESPONDENT

BISHOP LEGIONS OF MARY ..... 2ND RESPONDENT

(Being an Appeal arising out of the ruling and order of Hon M.K. Mwangi (Chief Magistrate) in Lodwar CMEL Case No. 11 of 2007 delivered on 04/03/2021)

JUDGMENT

INTRODUCTION

1. The Appellant was aggrieved by the determination of the trial Court made on March 4, 2021. In it, the trial Court allowed the Respondents' Application dated October 27, 2020 that sought to correct an error on the decree and costs awarded to the Appellant.

THE APPEAL

2. The Appellant filed his Memorandum of Appeal dated March 24, 2021 on March 25, 2021. He raised eleven (11) grounds disputing the findings of the trial court. He faulted the trial court for failing to consider his response to the Notice of Motion as captured in his Grounds of Opposition. He opined that the Court ought to have taken the Respondent's letter dated August 4, 2020 as well as the several Court attendances by the Respondents into consideration to demonstrate that the Court was functus officio. He argued that the matter was res judicata. He was of the view that the Court ought to have further been guided by the Respondents' antecedent unsuccessful Appeal and Miscellaneous Cause at the High Court in Kitale.

3. The Appellant, for the above reasons, prayed that the Appeal be allowed by setting aside the ruling of the trial Court delivered on March 4, 2021. He prayed that the Notice of Motion Application dated October 27, 2020 be dismissed with costs. He also asked for costs of the Appeal and those at trial.

HEARING OF THE APPEAL

4. The Appeal was heard on the basis of the parties' written submissions. The Appellant filed his submissions dated December 5, 2022 on December 6, 2022. He argued that the trial court lacked jurisdiction to entertain the Application since it came at execution stage. He submitted that the decree was properly drawn and captured the accurate findings of the trial court. The Appellant rehashed the contents of his Memorandum of Appeal, praying that the Appeal be allowed.

5. The Respondents filed written submissions dated January 19, 2023 on February 20, 2023. They opposed the Appeal. They submitted that the trial court analyzed all the issues before it when arriving at its determination. They pointed out that the trial court rightly found that the Application was not res judicata. Additionally, the Court was not functus officio. Finally, the Respondents stated that costs followed the pronouncements of the trial Court urging each party to bear its own costs. In light of those submissions, the Respondents prayed that the Appeal be dismissed with costs.

ANALYSIS AND DETERMINATION

6. I have considered the Appeal, examined the record of Appeal and analyzed the parties' rival written submissions. I observe that the Appeal emanates from a ruling and order of the court exercising its discretionary powers. Thus, as a first appellate court, I remind myself that this court will not normally interfere with the exercise of discretion unless exercised injudiciously. I invite the parties to appreciate that the Court was guided by the decision of the Court of Appeal in *United India Insurance Company Limited vs East African Underwriters (Kenya) Limited* [1985] EA 898 where Madan JA (as he then was) held:

> " The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting as at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of consideration of which he should have taken account of; or fifthly, that his decision albeit a discretionary one is plainly wrong."

7. This Court took into account in detail the submissions by both parties before arriving at the finding herein. They were relevant but mainly repeated the content arguments for and against the Application. Thus, I will not repeat them herein. In any event, submissions do not form the substance of any party's pleadings and evidence but are only a marketing language of the parties, as was stated by the Court of Appeal in the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR. In it, the Court stated:

> " 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."

8. In order to consider whether the trial Court exercised its discretion judiciously this Court has to analyze the facts and prayers in the Application which led to the ruling appealed from and compare them with the law and the determine how discretion was made. In their Application dated October 27, 2020, the Respondents urged the trial court to correct the error on the face of the decree. The grounds in support of the Application were that the suit was non-pecuniary, and the court did not award interest. However, to them, the award on interest was captured in the decree, hence it was wrong. The Application was vehemently opposed by the Appellant stating that the Court lacked jurisdiction to entertain the subject matter that was res judicata. Finally, that the Application was an abuse of the process of the Court.

9. The trial Court analyzed the arguments of both parties. It firstly noted that the suit was determined on September 8, 2010 and a decree for an unliquidated sum was issued on December 9, 2011. The court found that it was clothed with jurisdiction since the matter was pending execution. On res judicata, the Court noted that the same was not apparent as the Application arose out of error in computation from the registry. Furthermore, that matter had never been decided before any court or tribunal. Its further finding was that since there were no interest awarded on costs, the trial court observed that the Application was merited. For these reasons, the Court ordered that interest on costs was never awarded or implied and as such, the Application partially succeeded.

10. Starting with the first issue raised in the grounds of appeal, that is on whether the Application was res judicata, nothing was presented before me to suggest that a similar Application or similar issues between the same parties litigating under the same title had been formerly decided by a court of competence with finality. That argument thus fails.

11. On whether the court was functus officio, I am guided by the wordings of Section 99 of the *Civil Procedure Act*. The said Application was hinged on that provision providing that clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties. The words 'at any time' connote that correction of such errors is a function of the trial Court all the time until the matter is finally settled. Therefore, the court was clothed with jurisdiction without limitation as to time. As such, in my humble view, the court rightly found that it was properly vested with jurisdiction. In any event, it was the only court that could correct any errors of its own judgment, but within the law, that is to say, excluding interfering with its findings on the merits of the judgment or any discretion exercised therein in arriving at the judgment, in case there was one (an error). It is noteworthy that an award on costs in a suit is a matter left to the discretion of a Court, under Section 27 of the *Civil Procedure Act*. The provision is that:-

> "(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:
>
> Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."

12. Thus, in so far as the decision of the trial Court on the provision was made after considering the merits of the case, any finding as to who was to bear costs became part of the judgment. Thus, the Court became functus officio on that determination, and sealed it to the judgment. Any different determination arising therefrom could only be proper if it was as a result of the judgment being set aside by an appellate Court or the same Court if an application to set aside the same is filed and successful, or reviewed by the Court itself upon an application for review being brought and successfully argued within the principles of review of judgments and rulings.

13. In regard to the application that was before the Court, noting that the Application was properly filed before the trial court, this Court now considers whether or not the court's discretion under Section 99 of the *Civil Procedure Act* exercised judiciously. That answer lies in a scrutiny of the trial court's judgment. The judgment was delivered on September 8, 2010 by Nzyoki T (SRM). At the relevant ultimate paragraph of his judgment, the trial magistrate held:

> " In the sum, I have considered the evidence by the parties and submissions by the Plaintiff's Advocate. I am satisfied beyond reasonable doubt that the Plaintiff has established his rights over the suit plot and has proved the complained acts of waste and interference against the Defendants. I further find that the Defendants are not residing on the suit plot but on their separate parcel of land to the South. I accordingly dismiss the Defendants' defence and enter judgment for the Plaintiff in terms of prayer no (b). I further award the Plaintiff the costs of this suit and interest at court rates from the date of filing the suit".

14. I find that the matter before the Court having been a civil one required the standard of proof to be on a balance of probabilities and not beyond reasonable doubt. Be that as it may, it does not affect the finding he reached because it was not complained anyway. Thus, at the end of the proceedings, and in readiness for execution of the decree, one was extracted and issued on December 9, 2011. In part the decree stated as follows:

> "**IT IS HEREBY DECREED THAT:**
>
> a. An order of permanent injunction to restrain the Defendants jointly and severally from the Plaintiff's plot/land namely Lodwar Municipality/ Nakwamewi/Ngitakito/ 155 is entered.
>
> b. Costs of this suit awarded to the Plaintiff.
>
> c. Interest at court rates from the date of filing this suit awarded to the Plaintiff."(emphasis mine by way of underline)

15. A comparison of the content of the judgment and the decree clearly shows that they are the same. There was an award of costs in the judgment, and further, a relief of interest on the costs at court rates. Once the Court made that finding, it was functus officio on it. As explained above, the finding could only be varied by an appellate court or a successful application for review or the setting aside of the judgment. The Court could not vary the decision be way of any other means, and more so, through an application of the nature that was before it. Anything verbally stated by the Court did not and could not form part of the judgment whose decree a correction was sought.

16. As reproduced verbatim above, I find that both the decree and judgment were in tandem and the trial court exercised its decision injudiciously and erroneously when it allowed the Application to remove the award on interest from the decree. The pronouncements of the court were exceptionally unequivocal. They remain undisturbed. The Appellant was awarded interest from the date of filing suit. In fact, Respondent craftily did not invite the trial court to correct an error apparent on its face: they invited the Court to sit on appeal against its own decision. For the above reasons, I find that the Appeal lodged by the Appellant by way of his Memorandum of Appeal dated March 24, 2021 is with merit and must succeed, and I allow it.

17. Consequently, I make the following orders:

    a. The ruling and resultant order of the trial Court delivered on March 4, 2021 on the issue of interests on costs as captured in the trial court's judgment of September 8, 2010 be and is hereby set aside;

    b. The Respondents' Notice of Motion Application dated October 27, 2020 lacks merit, was and is for dismissal, and is hereby dismissed with costs to the Appellant;

    c. For clarity, the Appellant shall have the costs of this Appeal as well as of the Application.

18. Orders accordingly.

JUDGMENT DATED, SIGNED AND **DELIVERED** AT **KITALE VIA ELECTRONIC MAIL THIS 29TH DAY OF MARCH 2023.**

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE