Taruru v Kuyo & another (Civil Appeal 9 (CA 86 OF 2016) of 2016)
[2024] KECA 1844 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1844 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 9 (CA 86 OF 2016) OF 2016

MA WARSAME, FA OCHIENG & LA ACHODE, JJA

DECEMBER 20, 2024

BETWEEN

NDIOGO OLE TARURU ..... APPELLANT

AND

MARY BENSON KUYO ..... 1ST RESPONDENT

SELINA WANJIKU THENDEU ..... 2ND RESPONDENT

(Being an appeal from the Judgment of the Enviroment and Land Court at Nakuru (L. Waithaka J) dated 11th July 2014 in ELC Nak Civil Suit No. 5 of 2012)

JUDGMENT

1. Sometime in the year 2011, the 1st respondent Mary Benson Kuyo filed a complaint against the 2nd respondent Selina Wanjiku Thendeu with the Olokruto Land Dispute Tribunal. A verdict was entered in her favour and the same was subsequently adopted as the judgment of the Magistrate's court in Narok Misc. Land Case no. 14 of 2011 on 12th July 2011.

2. The decree ordered the 2nd respondent, Selina Wanjiku Thendeu, the second wife of Benson Thendeu Rebo, to vacate Plot No. CIS-Mara/Enabelbel/Enengetia/799, which was found to legally belong to the 1st respondent Mary Benson Kuyo. Selina was to relocate to Parcel No. CIS- Mara/Olposimoru/51 and the appellant's title thereto was to be cancelled.

3. Following the decree of the Court, the appellant filed a suit in the High Court in Nakuru Environment and Land court. With it, he filed an application seeking an order of injunction against the two respondents herein: to bar them from trespassing, transferring, or alienating the suit land known as plot NO.CIS- Mara/Oloposimoru/51; to cancel the decree from the Narok Misc Land Tribunal No. 41 of 2011; and to also cancel the award of the Olokurto Land Dispute Tribunal dated 12th May 2011.

4. The appellant averred that he was not enjoined as a party to the proceedings in the Tribunal and it was wrong and illegal for the Tribunal to order cancellation of his Title No. Narok CIS- Mara Olposimoru/ 51, when he was not a party to the proceedings. He therefore, applied to be enjoined in the suit as a party whose application was pending before the court.

5. In opposition to the application, the 1st respondent filed a replying affidavit sworn on 29th November, 2012 and a notice of preliminary objection. The grounds of the preliminary objection were that: the High court had no jurisdiction to either entertain the suit or grant the orders sought as the appellant's claim was res judicata: the appellant had no cause of action against the 1st respondent: and, the 1st respondent had no legal capacity to be served on behalf of the deceased's estate.

6. The 1st respondent also stated that her claim touched on two parcels of land. CIS-Mara Enabelbel/ Enengetia/799 which the 2nd Respondent is required to vacate, and the appellant's land CIS-Mara Olposimoru/ 51 in which the appellant's title is to be cancelled. That by staying the entire execution the 2nd respondent will benefit unfairly as she will continue to live on the 1st respondent's land. She averred that her claim prompted the panel of elders, to touch on the appellant's land and if there was an error in the findings of the elders she is not the one to blame.

7. The 1st respondent stated further that the appellant's recourse lay elsewhere but not in filing a suit against her. That his arguments, like the failure of the Tribunal to include him as a party in the Tribunal proceedings, should be raised elsewhere. That it was not fair, or in the interest of justice that the entire decree be set aside, as that would only act to benefit the 2nd respondent who should be moving out of her land. That to date, the 2nd respondent has never applied for stay of the decree and the 1st respondent is supposed to be executing that part of her decree by evicting the 2nd respondent from her land.

8. Before that application could be heard and determined, it was withdrawn on 24th October, 2012. On the same date, the appellant filed another application seeking an order for stay of execution of the decree dated 20th December, 2011 granted in Narok Misc. Land dispute No. 14 of 2011, adopting the entire award of the Olokurto Land Dispute Tribunal dated 23rd May, 2011. The order of stay was granted in October, 2012. It lapsed on 17th June, 2013.

9. The appellant stated that he purchased the parcel of land, plot No. CIS-Mara/Oloposimoru/51, from one Benson Thendeu Rebo in 1995 for Kshs. 837,000/= and has been in occupation of the land since then. However, in June 2012, he became aware of a decree in Narok Misc. Land Dispute No.14 of 2011 which ordered his title to the land to be cancelled and transfer be effected in favour of the 2nd respondent and Benson Thendeu Rebo. He discovered that there had been proceedings in the Olokurto Land Dispute Tribunal concerning both parcels no. Cis-Mara/Enabelibel/ Enengetia/799 and Cis-Mara/ Oloposimoru/51.

10. He learnt that the 1st respondent had filed a claim alleging that the 2nd respondent was occupying her land in plot No. CIS- Mara/Enabelbel Enengetia/799, while she should be occupying plot No.CIS-Mara/Oloposimoru/51. The Tribunal did not summon him to the said proceedings, despite being the registered owner of land parcel whose title they cancelled. He urged that the Tribunal acted outside its legal authority in making its decision.

11. The 2nd respondent did not appear, or file any response to the application.

12. Upon considering the rival arguments, Waithaka J in a ruling delivered on 11th July, 2014 found that indeed the Tribunal exceeded its jurisdiction by cancelling the appellant's title deed and that the appellant's right to a fair trial was violated as he was not given an opportunity to be heard in the tribunal proceedings. Nonetheless, the learned Judge held that the appellant should have brought the matter

as a constitutional petition and not a civil suit. That since his complaint was violation of his right to fair hearing, the proper way to challenge the decision of the Tribunal should have been by way of a constitutional petition under Article 22.

13. As a result, the learned Judge struck out the suit, ELC Civil Suit No. 5 of 2012 and dismissed the application. It is that ruling which prompted the appellant to file this appeal to the Court of Appeal. Mary Benson Kuyo and Selina Wanjiku Thendeu are the 1st and 2nd respondents, respectively.

14. The grounds of the appeal are that the learned trial Judge erred in law:

    i. By arriving at a conclusion that was not premised on the documentary evidence on record.

    ii. By misdirecting herself and failing to give due and proper consideration to the question for determination before her.

    iii. By arriving at a decision that the appellant's case was fatally defective, for want of form, upon wrongly considering the pleadings and documentary evidence placed before her.

    iv. By striking out the appellant's suit prematurely, as what was placed before her for determination was the application for a stay of execution pending the determination of the suit.

    v. By holding that the dispute between the parties related to the occupation of land whereas the evidence and material placed before her clearly showed that the dispute was one touching on ownership of Title No. CIS Mara/OLOPUSIMORU/51.

    vi. By failing to properly consider the Appellant's evidence on record.

    vii. By considering of wrong principles of law.

15. The appellant seeks orders that the appeal be allowed with costs, the decision of the learned Judge be set aside and the appellant's suit in the superior court also be allowed with costs.

16. The appellant in his written submission filed by M/s Githui and Company Advocates, contends that the superior court did not consider his case. He has appealed against the court's decision which found that his case was procedurally defective as it should have been filed as a constitutional petition and not a civil suit, to challenge the decision of the Tribunal. The appellant argues that this was an error on the part of the Court as his right to access justice was denied based on a technicality.

17. When the appeal came up for plenary hearing on 5th June 2024, Mr. Githui learned counsel appeared for the appellant and relied wholly on the submissions he had filed. The two respondents neither appeared nor did they file any submissions although they had been duly served with the hearing notice.

18. We have considered the record, the grounds of appeal, the rival submissions and the law. This being the first appeal the duty of this Court is as stipulated under Rule 31 (1) (a) of the Court of Appeal Rules, 2022 as follows:

> " On appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power to re-appraise the evidence and to draw inferences of fact.

19. This Court adverted to the duty of the court on first appeal in its decision of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, as follows:

> " [A]n appeal to this Court from a trial by the High Court is by way of 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 allowances in this respect."

20. Upon considering the grounds of appeal and the rival arguments of the parties in their submissions, it is evident that the pleadings in the suit before the superior court did not get a chance to see the light of day. They were neither argued nor determined. Therefore, the singular issue for determination before us is whether the superior court was right in striking out the appellant's case for reasons that it was brought as a civil suit and not a constitutional petition.

21. The learned Judge found in her ruling that the appellant's application was not commenced in the right way and was thus fatally defective for having been brought under Section 63 (e) of the *Civil Procedure Act*. She was of the view that if it was brought as a civil suit the court should have been moved under Order 22 rule 25 of the Civil Procedure Rules which provides that:

> " Where a suit is pending in any court against the holder of a decree of such court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise as it thinks fit, stay execution of the decree until the pending suit has been decided.".

22. The learned Judge however, deemed the application to be incompetent stating that since the complaint was on violation of the right to fair hearing, the proper way to challenge the decision of the Tribunal should have been by way of a constitutional petition under Article 22. The appellant argues that the finding of the Judge was legally inaccurate in light of Article 159 (2) (d) of *the Constitution*.

23. Article 159 elevates access to justice over procedural technicalities which do not affect substantive rights. It enjoins the courts to administer justice without undue regard to technicalities. The statutory derivative in Order 51 rule 10 of the Civil Procedure Rules addresses this issue as follows:

> "(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.
>
> (2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application."

20. The Supreme Court had occasion to consider the want of form in a matter before it in the case of Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone [2013] e-KLR thus:

> " The question then is, whether this omission is fatal to the applicant's case. It is trite law that a Court of law has to be moved under the correct provisions of the law. We note that this Court is the highest Court of the land. The Court, on this account, will in the interest of justice, not interpret procedural provisions as being cast in stone. The Court is alive to the principles to be adhered to in the interpretation of *the Constitution*, as stipulated in Article 259 of *the Constitution*. Consequently, the failure to cite article 163(5) will not be fatal to the applicant's cause'.

20. Even when a case involves a potential constitutional issue, the court will not automatically treat it as a constitutional petition simply because such an issue is raised. The court's focus is on the merits of the case, rather than procedural technicalities, to uphold the fundamental right to access justice.

20. This Court in Gabriel Mutava & 2 Others v Managing Director Kenya Ports Authority & Another [2016] eKLR stated as follows

> " Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation."

20. In the case of Daniel N. Mugendi v Kenyatta University & 3 Others [2013] eKLR, this Court rendered itself thus:

> " .....Citing the case of Alphonse Mwangemi Munga & Others vs African Safari Club Ltd [2008] eKLR, the learned judge was persuaded that *the Constitution* had to be read together with other laws made by Parliament. It should not be so construed as to be disruptive of other laws in the administration of justice and that accordingly parties should make use of the normal procedures under the various laws to pursue their remedies instead of all of them moving to the constitutional court and making constitutional issues of what is not. With all the foregoing, the learned judge concluded that the claim placed before her by the appellant was based on employment - a matter that should have instead been taken to the Industrial Court which had constitutional and statutory jurisdiction over such matters and not the High Court in the form of a constitutional reference." Emphasis added.

20. In Machakos HC Petition No. 13 of 2020, Martin Lemaiyan Mokoosio & another Vs Reshmapraful Chandra Vadera & Another, the court expressed the view that;

> " The mere fact that a matter that ought to have been brought as an ordinary suit is framed as a constitutional petition, does not thereby deprive the Court of jurisdiction to entertain the same. The court may frown upon that course and may even strike it out for being an abuse of the process but that does not make it a jurisdictional issue".

We opine that the converse is also true.

20. Courts will not consider a constitutional question unless the existence of a remedy depends on it. If a remedy is available to an applicant under some other legislative provision, or on some other basis, whether legal or factual, a court should decline to determine whether there has been, in addition, a breach of *the constitution*. This is because all disputes have an underlying constitutional breach.

21. The substratum of the case before us is a land dispute. The appellant is the holder of a title to a parcel of land which has been interfered with in favour of a third party in a dispute that did not involve him. The appellant thus filed a suit to assert his right to the said parcel of land. The application by which his entire suit was struck out was seeking a stay of execution, pending the hearing and determination of the suit. In the case of Godfrey Kirimi v Catherine Makena [2021] eKLR, the Court of Appeal stated that citing wrong provisions of the law in an application for stay of execution is not fatal.

22. It is therefore our considered view that the jurisdiction of the superior court was not ousted by the mere fact that the appellant complained that his right to fair hearing was violated. Striking out the entire suit for the reason that he filed it as a civil suit and not a constitutional petition was premature. At the very least, the principle of natural justice requires that all parties affected by a decision must be given an opportunity to present their case. The suit should have been considered on its merit in the interest of providing substantive justice over procedural technicalities.

23. Consequently, we find that this appeal has merit and is allowed with the following orders:

i. The decision of the learned Judge dismissing the application is hereby set aside.

ii. The decision of the learned Judge striking out the suit in the superior court is hereby set aside.

For avoidance of doubt:

iii. The appellant's application is hereby reinstated.

iv. The appellant's suit in the superior court is hereby reinstated.

v. The application and suit shall be heard and determined by any other Judge in the Environment and Land Court other than Waithaka J.

vi. The costs shall abide the outcome of the suit.

DATED AND DELIVERED AT NAKURU THIS 20TH DAY OF DECEMBER, 2024

M. WARSAME

.....

. JUDGE OF APPEAL

F. OCHIENG

.....

.. JUDGE OF APPEAL

L. ACHODE

.....

.. JUDGE OF APPEAL

I certify that this is a true copy of the original Signed

DEPUTY REGISTRAR