



Mwangi v Karanja (Sued in her capacity as the legal representative of the Estate of Joseph Karanja Mabula) (Environment and Land Appeal 20 of 2020) [2023] KEELC 20617 (KLR) (12 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20617 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL 20 OF 2020
LN GACHERU, J
OCTOBER 12, 2023**

BETWEEN

JOHN MUCHOKI MWANGI APPELLANT

AND

RACHAEL NYAMBURA KARANJA (SUED IN HER CAPACITY AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOSEPH KARANJA MABULA) RESPONDENT

(Being an Appeal from the directions of Hon. B M Ekhubi, Principal Magistrate, given on the 12th March 2020 and the order therein emanating)

JUDGMENT

1. The Respondent filed a suit against the Appellant in Thika CMCC No. 465 of 2006, seeking injunctive orders on the premise that the Appellant had trespassed on his parcel of land and caused developments thereon. The Appellant filed a Defence and Counter-claim to the suit claiming to be the owner of the suit property, and sought injunctive orders against the Respondent.
2. It appears from the proceedings of the trial Court that on 13th January 2009, parties consented to have the District Surveyor, Murang'a South, visit the suit property to ascertain the state of affairs. Yet again the parties seemingly varied the orders on 16th June 2009, and consented that the District Surveyor Thika, was to visit the suit property to ascertain encroachment. The trial Court gave an order, that the Report be filed in Court within twenty-one days. In compliance, the Surveyor's Report was prepared dated 26th November 2012, detailing the encroachment.
3. On 12th March 2020, the trial Court in noting the nature of dispute in Court as well as the challenge on the authenticity of the Report, directed that the District Surveyor, be called to authenticate the report. It is on this strength that the Appellant moved this Court on Appeal.



4. By a Memorandum of Appeal dated 30th November 2020, the Appellant faults the directions of the trial Court on the grounds that
 1. The Honourable Magistrate erred in law and fact by giving directions on an issue that had already been considered.
 2. The Honourable Magistrate erred in law and fact by determining issues that had been determined before.
 3. The Honourable Court erred in fact and in law by ordering that the District Land Surveyor, Thika be summoned to authenticate the Surveyor's report dated 28th November 2012, when no evidence was placed before them to show the said surveyor's report was not genuine.
 4. The Honourable Magistrate erred in law and in fact by giving directions which had the effect of re-opening the Respondent's suit, which had already been determined.
 5. The Honourable Court erred in failing to consider the aspect that the Respondent's suit against the Appellant had taken 12 years to be concluded.
 6. The Learned Magistrate erred in law and fact by ignoring the aspect that the issue as to whether or not the Surveyor's Report herein was genuine was res judicata and had been determined by a Court of competent jurisdiction before.
5. The Appeal was admitted for hearing, and parties were directed to dispense with the said Appeal by way of written submissions.
6. The Appellant filed his submissions on 3rd July 2023, through the Law Firm of Mutuku Wambua & Associates Advocates, and submitted on each ground of Appeal.
7. On grounds 1, 2 and 6, the Appellant maintained that the Respondent did not challenge the authenticity of the Surveyor's Report, and the Court vide its ruling of 24th October 2018, had determined the authenticity of the Report. He relied on the case of *Eunice Chemutai vs Sulleiman Karuga Njoroge* {2022} eKLR, where the Court found that a request for survey was res judicata its orders for surveying of the suit land.
8. It was the Appellant's further submissions that the authenticity of the Surveyor's Report was not challenged. That as a result therefore, the Court had no basis for allowing the application. Reliance was placed on the case of *Hamisi Mohammed Bakari & 5 Others vs Thomas Sadiki & 3 Others* {2020} eKLR, where the Court expressed itself that the Defendant ought to have produced a contradicting report and went ahead to authenticate the report.
9. The Appellant further submitted that the Respondent failed to comply with the directions of the Court and his suit was dismissed. That the Respondent appealed against the ruling of the trial Court of 24th October 2018, but the Appeal was dismissed, The Appellant submitted that the trial Court ought to have taken into account the period of delay which he attributes to the Respondent. In the end, he submitted that the directions of trial Court were res judicata the ruling of 24th October, 2018.
10. The Respondent filed his submissions on 24th July 2023, through the Law Firm of Waithira Mwangi & Co. Advocates and addressed the grounds of Appeal. It was his submissions that the Surveyor was to visit the ground and give a Report and that there was no order that the Report would be adopted without the marker. He submitted that the trial Court aptly complied with the provisions of Section 35 of *Evidence Act*, on admissibility of documentary evidence.



11. He further submitted that the Report was not conclusive enough and further submitted on the areas that he opined were not conclusive, adding that it was necessary for the trial Court to make further orders. The Respondent also submitted that calling the Surveyor would not have re-opened the case since the Appellant's Counter-claim was still pending. In the end, he submitted that there was no prejudice that the Appellant would suffer if the Surveyor was to testify.
12. Both parties claim the source of their ownership of the land was Methi & Swani Farmers' Co-operative Society Limited. It appears to this Court that there are two conflicting properties being L.R. No. Mitubiri/ Wempa Block 2/1150 and L.R. No. Mitubiri/ Wempa Block 2/1151. Each party is blaming the other for encroachment and it is apparent for this Court that there seem to be boundary dispute.
13. To ameliorate the situation, parties consented to having a District Surveyor to file a Report on the status of the suit properties. This consent was adopted as an order of the Court. This Consent was recorded on 16th June, 2009. Unfortunately, it took about three years for the Report to be prepared, which Report is dated 26th November, 2012. As per the Record, the matter was first set down for hearing on 21st May, 2015. On 8th June 2016, the Plaintiff's now Respondent counsel had intimated to the Court that he would call the Surveyor to produce the report. On 10th August 2016, the trial Court stood over the matter for want of jurisdiction up until 8th October 2017, when a date was fixed for hearing. What followed was a number of applications which resulted in the impugned directions.
14. Interestingly in 2018, the Respondent moved the trial Court vide a Notice of Motion Application, dated 10th April 2018, seeking that the suit be referred to the Land Registrar for determination. This was on the premise that the suit was about boundary dispute. The trial Court in determining the application vide its ruling of 24th October, 2018 held:
15. Since it is not clear why the dispute is still lying in Court after an expert report was filed, I want to associate myself with the Respondent's counsel submissions that the Applicant has not demonstrated to the Court what was wrong with the said report that was ordered by consent. I do not find any fraud or collusion proved or even proof that there was a fact misrepresented that would warrant setting aside or varying the consent terms”
16. The trial Court went ahead and allowed the application, but directed the Land Registrar Thika, to do a Report detailing which party was encroaching on the other parcel's. This notwithstanding, the trial Court did on 12th March 2020, issue directions that the Surveyor be called upon to authenticate the Report. The Appellant herein was dissatisfied with this direction and hence this appeal.
17. This is a first appeal and within the provisions of Section 65(b) of the *Civil Procedure Act*, this Court is allowed to determine the appeal on both law and facts. The trial Court exercised its discretion based on the facts placed before it, and this Court cannot simply interfere with that discretion, just because it has been moved on appeal. The Supreme Court when moved on Appeal in the case of *Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others* [2019] eKLR, had this to say about interfering with the discretionary powers

“In reiterating the above position, we affirm that we would only interfere with the Appellate Court's exercise of discretion if we reach the conclusion that in exercise of such discretion, the Appellate Court acted arbitrary or capriciously or ignored relevant facts or completely disregarded the principles of the governing law leading to an unjust order. Conversely, if we find that the discretion has been exercised reasonably and judiciously, then the fact that we would have arrived at a different conclusion than the Court of Appeal is not a reason to interfere with the Court's exercise of discretion.”



Further in the case of *Mbogo & Another vs Shah*, [1968] EA, p.15; the Court held as follows;-

“An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion, misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”

18. Thus, the Appellant must sufficiently guide this Court within the aforementioned parameters in order for this Court to interfere with the discretion of the trial Court.

19. This Court, is alive to its role on appeal as laid out in Section 78 of the *Civil Procedure Act* which is to re-evaluate, re-assess and re-analyze the evidence as contained in the Record of Appeal. This was echoed by the Court in the case of *Peter M. Kariuki v Attorney General* [2014] eKLR, where the Court held:

“We have also, as we are duty bound to do as a first appellate court, reconsidered the evidence adduced before the trial court and revaluated it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.”

20. The Supreme Court in the case of *Sonko v County Assembly of Nairobi City & 11 others* (Petition 11 (E008) of 2022), had this to say:

“A first appellate court should accord deference to the trial court’s conclusions of fact and only interfere with those conclusions if it appeared to it, either that the trial court had failed to take into account any relevant facts or circumstances or based the conclusions on no evidence at all, or misapprehended the evidence, or acted on wrong principles in reaching the conclusions.”

21. With this in mind and having perused the Record of Appeal and having considered the rival written submissions by parties and having also considered the authorities cited, the issues for determination are: -

- i. Whether the trial Court erred in issuing the directions of 12th March, 2020.
- ii. Whether the effects of the foregoing resulted in the re-opening the Plaintiff’s case.
- iii. Whether the authenticity of the Surveyor’s report had already been determined.
- iv. Who should bear the costs of this appeal.

I. Whether the trial Court erred in issuing the directions of 12th March, 2020?

22. This Court has already established hereinabove the genesis of the directions of 12th March, 2020. The Court in issuing its directions noted that the Surveyor’s Report was very vital, considering the nature of disputes. It also noted that despite the fact that the Court had pronounced itself on the Report, the issue of authenticity was a serious allegation that could not be wished away.

24. The Appellant contends that the authenticity of the Report was subject to the ruling of the trial Court of 24th October 2018, where the Court had faulted the Respondent for not citing any fault in the said Report. The trial Court had gone ahead and directed that the Land Registrar, Thika to do a second Report.



25. It is noteworthy that the parties to the suit are the ones that initiated the issue of obtaining a Surveyor's Report. This Court has perused the said Report dated 26th November 2012, and has noted the contents therein. It breathes life to the allegations of encroachment. It is not clear to this Court which parcel of land belongs to which party to the suit, but this can be discerned from the pleadings. The amount of encroachment is not also certain for this Court.
26. It is trite law that the opinion of an expert is not binding on a Court. It is also trite law that the Court cannot simply take in the opinion of an expert, simply because his evidence was not controverted. (See the cases of *SYT v TA* [2019] eKLR, *Kagina v Kagina & 2 others* (Civil Appeal 21 of 2017) [2021])
27. In the case of *Stephen Kinini Wang'ondu v The Ark Limited* [2016] eKLR, the Court extensively discussed the issue of reliance of expert opinion. The Court held:
- “Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, providing; it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called.
28. The Court further enumerated the probable criteria for adopting in assessing expert opinion. It held:
- “While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. Four consequences flow from this.
- Firstly, expert evidence does not “trump all other evidence”. It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance.
- Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be “artificially separated” from the rest of the evidence. To do so is a structural failing. A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together.
- Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.
- Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones.
29. In essence, a Court cannot simply adopt the opinion of the expert witness without interrogating the facts therein to understand how the Surveyor arrived at the conclusion. While this Court agrees with the fact that the use of a Surveyor's services was by consent, it is well stated above that the Court cannot simply rely on the evidence.



30. It is imperative to point out that the Court when giving its directions noted that there were serious allegations that could not be avoided. As evident from the record, the Respondent had indicated that he was going to call a Surveyor as one of his witness. There is nowhere on the record to show that the Report was ever adopted by the trial Court, either on its own motion or by application from the parties. The Court in *Stephen Kinini Wang'ondou v The Ark Limited*, supra, held:

“It is a trite principle of evidence that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof. The importance of proving the facts underlying an opinion is that the absence of such evidence deprives the court “of an important opportunity of testing the validity of process by which the opinion was formed, and substantially reduces the value and cogency of the opinion evidence”. An expert report is therefore only as good as the assumptions on which it is based.”

31. Justice is a double edged sword, and the trial Court was bound by the rules of natural justice and evidence to balance the interest of both parties. This was reiterated by the Court of Appeal in the case of *Kanwal Sanjit Singh Dhiman –vs- Kashavji Jivraji Shah* (2015) eKLR, where the Court of Appeal observed that: -

“the courts exist for the purposes of dispensing justice and that the sword of justice cuts both ways. As a court, we have to balance the two divergent interests. Further, it has been said time and again that a technical Judgment is not the best Judgment,”

32. To determine whether the trial Court erred, this Court must determine whether the authenticity of the Report was put to test by the trial Court in its ruling of 24th October, 2018.

33. The genesis of the said ruling was the Respondent’s (Plaintiff’s) application of 10th April 2018, which sought to have the matter referred to the Land Registrar for determination. The Appellant had opposed the said Notice of Motion and deponed that the issues raised by the Respondent in the application were res judicata. The trial Court noted that it had the jurisdiction to handle the matter and frowned at the Respondent’s 12-year delay in raising the issue of jurisdiction.

34. In its ruling the trial Court appreciated that parties had consented and it found no reason to vary or set aside the consent. Respectfully, there is nowhere in the record that shows that the trial Report was ever adopted as the finding of the Court or anything to show the Court was ever persuaded by the said Report. The consent was limited to directing the Surveyor to file a Report on encroachment. What the trial Court simply did there was, to point out that the Respondent herein had not challenged the authenticity of the Report. The Respondent’s application did not challenge the authenticity of the report.

35. As a matter of record, there is nowhere in the impugned application that made reference to the authenticity of the Surveyor’s Report. Unless this Court will be persuaded that when the trial Court made reference to the authenticity of the report in its ruling, the same amounted to adopting by implication. It is thus not clear to this Court at what point the authenticity of the Report was introduced in the said ruling. As rightly stated by the Court in the case of *Stephen Kinini Wang'ondou v The Ark Limited*, supra, it is important for facts underlying an opinion to be proved.

36. This Court is alive to the orders of the trial Court requiring the Land Registrar, Thika to make a further Report, yet there was a Surveyor’s Report, that was already in the file. Respectfully, the issue



of boundary encroachment had already been captured in the Report. It simply needed an explanation, and that could be the reasons why the trial Court at least called for the testimony of the Surveyor.

37. Notably, a Court has the discretionary powers to issue such orders as it may deem fit. This discretionary power may be interfered with on Appeal as has been stated hereinabove. The Appellant has the duty to lead this Court on how the Court erred in applying the discretionary power or demonstrate how such exercise caused prejudice in his end.
38. This Court is alive to the laxity occasioned by the Respondent herein towards the proceedings. However, this Court is not persuaded that the trial Court erred in giving the impugned directions. After all a Court may give such orders as to the ends of justice. It is evident from the record that the trial Court had expressed concern over the continuance of the matter. There is no evidence that the Appellant was prejudiced by directions issued. Therefore, it follows that the Court did not err in issuing the said directions.

II. Whether the effects of the foregoing resulted in the re-opening the Plaintiff's case?

39. The Appellant contends that the orders of the Court resulted in the re-opening of the Plaintiff's case. Whether this is true or not will need this Court to investigate the conditions issued in the ruling of 24th October, 2018. The trial Court had allowed the application on conditions set out in the said ruling, failure to which the suit would stand dismissed.
40. It was a condition of the trial Court that a Report be filed by 7th November 2018, failure to which the suit would stand dismissed. As per the said ruling, the process was to be undertaken by the Respondent herein. It is clear from the record that there was non-compliance, the result of which the suit was dismissed. A perusal of the proceedings of the trial Court informs this Court that as at the time of the said directions, the suit was dismissed.
41. The importance of the Surveyor's Report was to enable the trial Court make a finding on the encroachment. It was not to aid the Respondent's case only. The Appellant herein also had a claim for encroachment. There was a counter-claim available for determination. (see the case of *Muna & 5 others v Boscardin & 5 others* (Environment & Land Case 27 of 2020) [2022])
42. Order 7 Rule 3 allows a Defendant in a suit to file a Counter-claim over the same subject matter. The fate of a Counter-claim where the main suit is dismissed is well elaborated by Order 7 Rule 13 of the *Civil Procedure Rules*. It provides as follows:

“Discontinuance, stay or dismissal of suit.13. If, in any case in which the defendant sets up a counterclaim the suit of the plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with.”
43. The dismissal of the Plaintiff's suit did not deny the Plaintiff audience in Court after all there was a Counter-claim, which is a separate suit that survives the dismissed suit. The directions issued did not grant the Plaintiff an opportunity to revive his case. The same was limited to examining a document that was already in the Court file. This Court must emphasize that the Plaintiff's suit is dismissed and with no orders reviving it, the same is spent.
44. It is important to point out that the testimony of the Surveyor is meant to aid the Court in also determining the Appellant's Counter-claim. The Respondent can only be allowed to examine the Surveyor on the contents of the Survey Report and nothing else. Therefore, it is evident that the said directions cannot be construed as reviving the Respondent's suit.
45. The upshot of the above is that the appeal lacks merits and is hereby dismissed.



III. What Orders can this Court give for the interest of justice?

46. The Court take notes of the age of the matter and can only empathize with the parties. A lot has happened since the filing of the case including the promulgation of *the Constitution* that calls for just and expeditious disposal of cases under the realm of right to fair hearing. In light of the above findings, and in light of the stay orders, it is imperative that this Court issues directions.
47. The effect of the above findings is that the Surveyor's Report is open for examination. While time might have lapsed and this Court is not aware of the current state of the encroachment, it will only be in the interest of justice that this Court issues the foregoing orders:
- a. The Respondent's suit stands dismissed, as per the Ruling of the trial Court of 24th October 2018.
 - b. The Surveyor be called for purposes of examining the authenticity of the Surveyor's Report.
 - c. Any examination that may result from (b) above shall be limited to the contents of the Report.
 - d. If the Surveyor cannot be traced, a Government Surveyor be and is hereby instructed to within 30 Days of this Judgement, prepare a detailed Report on the current status of the suit property.
 - e. In case of (d) above, parties shall jointly bear the costs of the survey.
 - f. Counter-claim be set down for hearing within 45 Days of this ruling.

IV. Who should bear the costs of this Appeal?

48. It is trite law that costs shall follow the events and a successful party is eligible to costs. The appeal suffered the fate of dismissal. The Respondent's conduct towards the proceedings is noted and this Court cannot award him costs. Therefore, the Court directs that each party to bear his/her own costs.
49. In a nutshell, the Court finds and holds that the Instant Appeal is not merited. The said Appeal is dismissed entirely, with the Court issuing the above directions.
50. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 12TH DAY OF OCTOBER, 2023.

L. GACHERU

JUDGE

Delivered online in the presence of; -

M/s Owino H/B M/s Mutuku for the Appellant

M/s Waithira Mwangi for the Respondent

Joel Njonjo - Court Assistant

L. Gacheru

Judge

12/10/2023

