



**Family Welfare Organization & another v Karanja & 5 others (Environment and Land Appeal E17 of 2022) [2023] KEELC 20858 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20858 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND APPEAL E17 OF 2022  
LA OMOLLO, J  
OCTOBER 19, 2023**

**BETWEEN**

**FAMILY WELFARE ORGANIZATION ..... 1<sup>ST</sup> APPELLANT**

**DAVID KAMAU NDIRANGU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JOHN NGUGI KARANJA ..... 1<sup>ST</sup> RESPONDENT**

**STEPHEN KIARIE WANJIKU ..... 2<sup>ND</sup> RESPONDENT**

**JOEL MWANGI WAINAINA ..... 3<sup>RD</sup> RESPONDENT**

**NELSON MWANIKI MAINA ..... 4<sup>TH</sup> RESPONDENT**

**MARGARET NJERI KIMANI ..... 5<sup>TH</sup> RESPONDENT**

**MERCY WAMBUI NJIHIA ..... 6<sup>TH</sup> RESPONDENT**

*(Being an appeal arising from the ruling of honorable J. Karanja  
SPM delivered on 20th April 2022 in Naivasha CMCC 339 of 2016)*

**JUDGMENT**

**Introduction.**

1. By the Memorandum of Appeal dated 11<sup>th</sup> May, 2022, the Appellants appeal from the ruling of Honorable J. Karanja SPM delivered on 20<sup>th</sup> April, 2022 in CMCC 339 of 2016.
2. The grounds of appeal are;
  - a. That the honourable Magistrate erred in law and fact by discharging existing interim orders of injunction issued on 29<sup>th</sup> of July 2020 and allowed the 6<sup>th</sup> Respondent/Interested party to



proceed with construction on the suit premises Plot Site & Service Scheme Kabati/469 despite the fact that the said Respondent had already been in open violation of the same orders of injunction by constructing more than two floors of the storied building in open defiance of the court's existing and valid order.

- b. That the honourable Magistrate court (SIC) erred in law and fact by making a finding on balance of convenience tilting in favour of the 6<sup>th</sup> Respondent/Interested party despite there being sufficient evidence that there existed two parallel documents of ownership to the same physical ground hence the need to freeze any activities that would adversely affect either party after the conclusion of the main case.
  - c. That the honourable Magistrate erred in law and in fact in failing at the very least to order that the 6<sup>th</sup> Respondent/Interested party place a substantial security for possible heavy costs in a case of this nature.
  - d. That the honourable magistrate erred in law and in fact in making a finding that any possible damages that could be suffered by the Appellants could be compensated by an award of damages if they were successful, without showing why this same argument could not be used on the 6<sup>th</sup> Respondent who was a late entrant in the case and actually an interested party in a suit that had initial substantive parties.
  - e. That the honourable magistrate's court (SIC) erred in law and in fact in failing to appreciate that the matter before him being a fairly old, the most reasonable solution would have been to give hearing dates on a priority basis but not allow one party to go on with construction.
  - f. That the honourable Magistrate's court (SIC) erred in law and in fact by not appreciating the new dilemma its ruling created whereby in the event the Appellants won the case, they would be confronted with a possible scenario of a building much improved in value and with tenants as third parties in the equation, the possibility of demolishing the multi storied building in an urban setting or even the possibility of having to buy an expensive building they did not need.
3. The Appellants pray that the appeal be allowed and the discharged orders of injunction issued on 29<sup>th</sup> July, 2020 be reinstated with costs to them.

### **Factual Background.**

4. The Appellants (in the subordinate court) vide the Further Amended Complaint dated 22<sup>nd</sup> January, 2020 instituted a suit against the Respondents herein claiming that they are owners of various parcels of land which they allege that the Respondents have been trespassing on under the guise of inspection.
5. The Appellants sought orders of permanent injunction against them, together with an order of eviction and costs.
6. Prior to the filing the Further Amended Complaint, the record of Appeal shows that the Appellants had filed an application dated 16<sup>th</sup> April, 2016 seeking the following;
  - a. Orders of temporary injunction against the Respondents pending the hearing and determination of the application and
  - b. orders of permanent injunction against the Respondents pending the hearing and determination of the suit.
7. On 16<sup>th</sup> May, 2016, the said application was allowed. The result was that the Respondents were restrained from interfering with the suit properties pending the hearing and determination of the suit.



8. The Appellants subsequently filed another application dated 22<sup>nd</sup> January, 2020 seeking the following orders;

- a. That this application be certified urgent and service thereof be dispensed with at the first instance.
- b. That there be orders of temporary injunction against the Defendants, jointly and severally and by themselves or through their appointed agents, servants or representatives by whatever description, stopping them from making unauthorized entry repeatedly on the premises known as;
  - i. Plot.UNS/Residential/Plot No.44/Naivasha Municipality.
  - ii. Plot.UNS/Residential/Plot Np.05/Naivasha Municipality.
  - iii. Plot.UNS/Residential/Plot No. 65/Naivasha Municipality.
  - iv. Plot. UNS/Residential/Plot No. 33 T.O.L Kabati area Naivasha Municipality.
  - v. Plot. UNS/Residential/Plot No. 35 T.O.L Kabati area Naivasha Municipality.
  - vi. Plot.UNS/Residential/PlotNo.216/Naivasha Municipality.
  - vii. Plot.UNS/Residential/Plot No. 62 T.O.L Kabati Area Naivasha Municipality.
  - viii. Plot.UNS/Residential/Plot No. 469 Naivasha Municipality.
  - ix. Plot.UNS/Residential/Plot No. 57/Naivasha Municipality.
  - x. Plot.UNS/Residential/PlotNo.172/Naivasha Municipality.
  - xi. Plot.UNS/Residential/Plot No. 1/Naivasha Municipality.
  - xii. Plot.UNS/Residential/Plot No. 77/Naivasha Municipality

Until the hearing and determination of this application interpaties.(sic)

- c. That there be permanent orders of injunction against the Defendants, jointly and severally and by themselves or through their appointed agents, servants or representatives by whatever description stopping them from making unauthorized entry repeatedly or otherwise on the premises known as;
  - i. Plot.UNS/Residential/PlotNo.444/Naivasha Municipality.
  - ii. Plot.UNS/Residential/PlotNp.505/Naivasha Municipality.
  - iii. Plot.UNS/Residential/Plot No. 65/Naivasha Municipality.
  - iv. Plot. UNS/Residential/Plot No. 33 T.O.L Kabati area Naivasha Municipality.
  - v. Plot. UNS/Residential/Plot No. 35 T.O.L Kabati area Naivasha Municipality.
  - vi. Plot.UNS/Residential/PlotNo.216/Naivasha Municipality.
  - vii. Plot.UNS/Residential/Plot No. 62 T.O.L Kabati Area Naivasha Municipality.
  - viii. Plot.UNS/Residential/Plot No. 469 Naivasha Municipality.
  - ix. Plot.UNS/Residential/Plot No. 57/Naivasha Municipality.



- x. Plot.UNS/Residential/PlotNo.172/Naivasha Municipality.
  - xi. Plot.UNS/Residential/Plot No. 1/Naivasha Municipality.
  - xii. Plot.UNS/Residential/Plot No. 77/Naivasha Municipality Until the hearing and determination of this case.
- d. That the honorable court does allow for purposes of implementation of orders above allow immediate inclusion of the extra parcel numbers indicated in prayers 2 and 3 above.
  - e. That the Officer Commanding Station (Naivasha Police Station) to supervise compliance with these orders.
  - f. That costs of this application be provided for.
9. The said application was allowed as prayed on 29<sup>th</sup> July, 2020.
10. The 6<sup>th</sup> Respondent filed the application dated 6<sup>th</sup> August, 2020 on 10<sup>th</sup> August, 2020 seeking the following orders;
- 1. That this application be certified as urgent and be heard ex-parte in the first instance.
  - 2. That this honorable court be pleased to grant leave to the intended applicant to be enjoined in this suit as an interested party.
  - 3. That there by a stay of further proceedings in this matter pending the hearing and determination of this application.
  - 4. (The said prayer is not clear from the record of appeal)
  - 5. That this honorable court be pleased to make such further and or other orders as it may deem just, fair, reasonable and appropriate in the circumstances in order for the ends of justice to be met.
  - 6. That costs of this application be provided for.
11. The 2<sup>nd</sup> Appellant responded to the said application through a replying affidavit sworn on 27<sup>th</sup> August, 2020.
12. The Learned Trial Magistrate delivered his ruling on 27<sup>th</sup> January, 2021 in the following terms;
- “The parties filed their respective submissions in respect of the application which have been duly considered along with the authorities relied on therein. The Plaintiffs state they did not object to the interested party being enjoined to the suit but raised an issue regarding the identification and definition of the plot as regards or vis-a-vis the actual site on the ground where the intended interested party is undertaking construction.
- There are issues that I feel properly can and ought to be addressed and ventilated in trial with the participation of all parties including the intended interested party.
- All things considered therefore the application is hereby allowed in terms of prayer No. 2 i.e. for leave to the intended interested party/applicant to be enjoined in the suit as an interested party. Costs shall await the cause.”
13. The Appellants have, in their record appeal, included an order issued on 20<sup>th</sup> April 2022 issued by Hon. J Karanja (SPM). It is as follows;



- a. That the temporary injunction order issued by this court on 29<sup>th</sup> July, 2022 against the Defendants jointly and severally and by themselves or through their appointed agents, servants or representatives by whatever description stopping them from making unauthorized entry repeatedly or otherwise on the premises listed below, is vacated. For the avoidance of doubt, the orders herein are in reference to the Interested Party.
    - i. Plot.UNS/Residential/Plot No. 469 Site and Service Scheme Kabati
  - b. That parties can and shall continue to ventilate on the issue of ownership at or during trial.
  - c. That mention be on 22<sup>nd</sup> June, 2022.
14. The present appeal arises from this order dated 20<sup>th</sup> April, 2022.

#### **Issues for Determination.**

15. The Appellants filed their submissions on 22<sup>nd</sup> March, 2023 while the Respondents did not file any submissions.
16. The Appellants submit that the basis for the appeal is the fact of discharge of orders of injunction that had been issued on 29<sup>th</sup> July, 2020. They submit that the discharge of the said orders had the effect of allowing the 6<sup>th</sup> Respondent to proceed with construction on the suit parcel i.e. Plot Site & Service Scheme Kabati/469.
17. The Appellants also submit that there are two parallel ownership documents with respect to the same property and a final finding of ownership would be determined during trial.
18. The Appellants further submit that the purpose of the orders of injunction was to preserve the suit premises pending the hearing and determination of the issue of ownership.
19. It is the Appellants submissions that they have gone through the ruling and they could not discern the reasons given.
20. It is also the Appellants submissions that construction is ongoing on the property and that when the matter will be determined, there is a likelihood that there will be a dilemma on what to do with the said building.
21. The Appellants rely on the judicial decision of *In re Estate of Harish Chandra Hindocha (Deceased)*[2021] eKLR in support of their submissions and seek that the orders of injunction be reinstated.

#### **Analysis and Determination.**

22. Before delving into issues for determination, this court notes that the Appellants have appealed from the ruling said to have been delivered by Hon J. Karanja on 20<sup>th</sup> April, 2022.
23. The Appellants have included a copy of an order arising from the said ruling delivered on 20<sup>th</sup> April, 2022 but the ruling does not form part of the record of appeal.
24. The ruling that was included in the record of appeal was the ruling that was delivered on 27<sup>th</sup> January, 2021 which allowed the 6<sup>th</sup> Respondent to be joined to the suit.
25. Neither the proceedings nor the ruling said to be appealed from have been included in the Record of Appeal.



26. Order 42 Rule 13(4) of the *Civil Procedure Rules* provides as follows;
- (4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:
- (a) the memorandum of appeal;
  - (b) the pleadings;
  - (c) the notes of the trial Magistrate made at the hearing;
  - (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
  - (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
  - (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal...
27. In the judicial decision of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others* [2015] eKLR the Supreme Court held as follows;
- “(41) Without a record of appeal a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or the *Constitution*, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.” (Emphasis Mine)
28. The Record of Appeal filed herein does not include the application that gave rise to the ruling delivered on 20<sup>th</sup> April, 2022. The said ruling, as I already mentioned, does not also form part of the record.
29. The Record of Appeal does not also have the proceedings pertaining to the hearing of the application that gave rise to the orders of 20<sup>th</sup> February, 2022.
30. As was held by the Supreme Court in *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others* (*Supra*), if the requisite bundle of documents is omitted from a record of appeal, then the appeal is incompetent and defective.

### **Disposition.**

31. In the result, I find that the appeal lacks merit and is hereby struck out with costs to the Respondents.
32. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 19<sup>TH</sup> DAY OF OCTOBER, 2023.**

**L. A. OMOLLO**

**JUDGE**

In the presence of: -



Mr. Gachiengo for the Appellants.

No appearance for the Respondents.

Court Assistant; Ms. Monica Wanjohi.

