Mjomba v Mwanjala & 4 others (Environment and Land Appeal E001 of 2024) [2024] KEELC 5071 (KLR) (Environment and Land) (4 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5071 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VOI

ENVIRONMENT AND LAND

ENVIRONMENT AND LAND APPEAL E001 OF 2024

EK WABWOTO, J

JULY 4, 2024

BETWEEN

SELINA MSAE MJOMBA ..... APPELLANT

AND

HARON KACHILI ..... 1ST RESPONDENT

STEPHEN MWANJALA ..... 2ND RESPONDENT

MWAMBANGA MKALI ..... 3RD RESPONDENT

JOYCE KADOMA ..... 4TH RESPONDENT

NEW LIFE INTERNATIONAL GATHERING CHURCH ..... 5TH RESPONDENT

(Being an Appeal from the Ruling of the Hon. T.N. Sinkiyian (SRM) dated 7th July 2022 in Voi Principal Magistrate's Court ELC Civil Case No. E047 of 2021 Selina Msae Mjomba vs Stephen Mwanjala & 4 Others)

JUDGMENT

1. This is an Appeal against the Ruling of Hon. T. N. Sinkiyian (SRM) (as she then was) dated 7th July 2022 in Voi Principal Magistrate's Court ELC Civil Case No. E047 of 2021 Selina Msae Mjomba v Stephen Mwanjala, Haron Kachili, Mwambanga Mkali, Joyce Kadoma and New Life International Gathering Church in which the Learned Magistrate dismissed the Appellant's application dated 30th September 2021 and allowed the 4th Respondent's application dated 26th November 2021 striking out the suit against her.

2. The Appellant being aggrieved by the said ruling filed this appeal through a Memorandum of Appeal dated 25th July 2022. The following grounds were raised in the Appeal: -

1. That the Learned Trial Magistrate erred in law and fact in failing to properly consider and evaluate the entire evidence placed on record by the Parties.

2. That the Learned Trial Magistrate erred in law and fact in failing to correctly apply the law on the required standard of proof in civil cases in interlocutory applications thereby arriving at a wrong decision.

3. That the Learned Trial Magistrate erred in fact and in law in failing to consider judicial precedent and arrived at a wrong decision on summary dismissal of suits as set out in the case of *DT Dobie & Company Limited v Joseph Mbaria Muchina & Another* [1980] eKLR.

4. That the Learned Trial Magistrate erred in law and in fact in failing to consider the submissions of the parties and their pleadings on record.

5. That the Learned Trial Magistrate misapprehended the evidence and took into account extraneous issues and so arrived at a decision that was erroneous and not sustainable in law.

6. That the Learned Trial Magistrate erred in law and fact by looking at the merits and demerits of the main suit at such an interlocutory stage of the suit.

7. That the Learned Trial Magistrate erred in law and fact by summarily dismissing the entire suit against the 4th Defendant despite the existence of triable issues between the parties as evidenced on both the plaint and the 4th Defendant's own written statement of defence on record.

8. That the Learned Trial Magistrate erred in law and fact by exclusively analysing the admissibility or otherwise of the Plaintiff's evidence on record at such an interlocutory stage of the suit.

3. On the basis of those grounds, the Appellant sought the following reliefs:-

   a. The Appeal herein be allowed with costs.

   b. The Ruling and Order dismissing the Plaintiff's/Appellant's prayer for an order of status quo be set aside and judgment be entered for an order of status quo pending the hearing and determination of the main suit.

   c. The Ruling and Order allowing the 4th defendant's application for summary dismissal of the main suit against the 4th Defendant be set aside and Judgment be entered for an Order that the 4th Defendant is a proper party in this suit.

   d. The Order directing that the Plaintiff do pay the costs of her application, pay the 4th Defendant the costs of the 4th Defendant's application and the costs of the main suit as against the 4th Defendant be set aside and judgment be entered for an order that costs be in the cause.

4. The appeal was canvassed through written submissions. The Appellant relied on her written submissions dated 27th October 2023, while the 4th Respondent filed her written submissions dated 12th April 2024.

5. The Appellant submitted on the following two issues; whether the Appellant's grounds of Appeal raised in her Memorandum of Appeal are merited and who should bear costs. Relying on the provisions of Section 106A of the *Evidence Act* and the case of *Jack & Jill Supermarket Ltd =Versus= Viktar Maina Ngunjiri* (2016) eKLR it was argued that electronic evidence is deemed admissible if accompanied by a certificate in terms of Section 106B (4) of the *Evidence Act*. It was submitted that the court ought to make a determination on whether the photo showing the 4th Respondent's house marked as

Appellant's Annexture "JMM – 8" is of any probative value and in compliance with the powers of the *Evidence Act* Cap. 80 of the Laws of Kenya.

6. It was also submitted that 4th Respondent under paragraphs 7 and 8 of the Replying Affidavit had admitted that the land in question was sold to her by one Brian Mwabora Kinoi who was later charged with obtaining money by false pretences as the said land did not belong to him and that this in itself showed some semblance of a cause of action upon which the trial court ought to have considered instead of striking out the 4th Respondent's suit as against the Appellant. The case of *Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff)* [2022] eKLR was cited in support.

7. It was also argued that the court erred in not granting the status quo orders sought because the Appellant stands to be highly prejudiced and exposed. It was further submitted that the Appellant's suit as against the 4th Respondent did not qualify to be struck out as there were traces of triable issues that had been admitted by the 4th Respondent. The Appellant faulted the court for failing to apply the law on the required standard of proof in civil cases in interlocutory applications and also failing to consider the submissions of parties and their pleadings on record. The court was urged to allow the appeal and grant the orders sought.

8. The 4th Respondent filed her written submissions dated 12th April 2024. It was argued that the 4th Respondent had presented sufficient evidence showing that she is no longer on the suit property when the court struck her name out of the suit. The 4th Respondent had declared on oath that she had no interest on the suit property and that she had left the same and hence the trial court did not err when it struck out the 4th Respondent from the suit.

9. It was also submitted that the trial court properly considered the submissions and pleadings of the parties and declined to grant the Appellant the orders that she had sought in her application. The court was urged to dismiss the appeal with costs.

10. The court has considered the Record of Appeal and the submissions filed by the parties and proceeds to outline the following issues for determination:-

    i. Whether the trial court erred in striking at the 4th Respondents from the proceedings before the lower court.

    ii. Whether the trial court erred in dismissing the Appellant's application dated 30th September 2021.

11. This being the first appeal, this Court has power to review the facts and evidence and draw its own conclusions. In the case of *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR the Court of Appeal restated the duty of first appellate Court as thus: -

> " This being a first Appeal, we are reminded of our primary role as a first appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way,"

12. Order 1 Rule 10(2) of the *Civil Procedure Code* gives the court the power either on its own motion or an application by any of the parties to a suit to strike out the name of any party improperly joined to the suit or to order any person to be joined if, in the courts view, such a person is necessary for it to adjudicate upon and settle all the questions in the suit effectually and completely.

13. The question whether a claimant has a cause of action against a defendant is not unusual in day-to-day civil litigation. More often than not a defendant will plead, in opposition to the claim, that the claimant's suit does not disclose a cause of action against him and, for this reason, it ought to be either struck out or dismissed altogether. Having been litigated upon for a considerable period, courts do no better than reflect on prior decisions in which this question has been discussed whenever it emerges. The often cited precedent in our local jurisprudence in this regard is the Court of Appeal decision in *D.T. Dobbie Kenya Co. Ltd v Joseph Mbaria Muchina & Leah Wanjiku Mbugua* [1982] KLR 1 where this issue was discussed, relatively at length. Order 2 Rule 15 of the *Civil Procedure Rules* stipulates *inter alia* that a suit maybe struck out against a party if it disclosed 'no cause of action' against it and also because it was 'an abuse of the process of the court.'

14. In the instant case, the 4th Respondent moved the trial court by her application dated 26th November 2021 and argued that the Appellant's suit did not disclose any reasonable cause of action against it. It was averred that the 4th Respondent had bought the suit land from one Brian Mwabora Kinoi sometimes in 2020 and she had never undertaken any developments therein.

15. It was deponed that sometimes in 2021, Brian Mwabora Kinoi was summoned by the DCIO Voi Police Station to respond to allegations of obtaining money by false pretence and he agreed and subsequently refunded money to the 4th Respondent being Kshs. 220,000/= in the presence of the DCI and since then the 4th Defendant has never been in the suit property.

16. The Appellant had sought status quo and injunctive orders against the 4th Respondent in her application dated 30th September 2024. The Appellant deponed at paragraph 10 of her supporting affidavit that the 4th Respondent had without any consent constructed a residential house in the property a fact which was denied by the 4th Respondent.

17. From the evidence that was tendered it is evident that the 4th Respondent is not in occupation of the suit property having vacated the same upon receipt of the refund that was paid towards purchase of the suit property. There was no evidence that the Appellant had any interaction, transaction and or engagement with the Appellant in respect to the suit property save for a meeting they had at Voi Police Station when the 4th Respondent had been summoned together with one Brian Mwabora Kinoi who had fraudulently sold the land to her. Save for that position there is no evidence adduced that the 4th Respondent has any subsisting interest in respect to the suit property and in the circumstances, it will not save any useful purpose to have the 4th Respondent retained in the proceedings and in view of the foregoing the trial court cannot be faulted for striking out the 4th Respondent from the suit.

18. As to whether or not the trial court erred in declining to grant the injunctive orders sought, it is evident that the Appellant had sought for a temporary injunctive order against the Respondent and in the alternative orders of status quo.

19. In respect to injunctive orders sought, it is worth noting that the Appellants were aggrieved by the decision of the trial court when it declined to grant the temporary injunctive orders or status quo orders sought. As was restated in the case of *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A, a court sitting on Appeal will not interfere with a discretionary decision appealed from simply on the ground that the court, if sitting at first instance, would or might have given different weight to that given by the court to the various factors in the case.

20. This court sitting of Appeal is only entitled to interfere if one or more of the following matters are established; first, that the court misdirected himself in law; secondly, that the court misapprehended the facts; thirdly, that the court took account of considerations of which he should not have taken account;

fourthly, that the court failed to take account of considerations of which he should have taken account, or fifthly, that the court's decision, albeit a discretionary one, is plainly wrong. As earlier observed, one of the issues in this appeal is whether the trial court erred in the exercise of its discretion in declining to grant the Appellant the interlocutory relief of an injunction and or status quo orders sought.

21. The principles governing whether or not to grant an interlocutory injunction were settled in *Giella v Cassman Brown & Co. Ltd* [1973] E.A 358 and were reiterated in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR. Such an applicant must establish a *prima facie* case with a probability of success. Even if he succeeds on that first limb, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages will be an adequate compensation then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

22. In the specific context of such applications before this court, one should also bear in mind Paragraph 32 of Practice Directions on Proceedings in The Environment and Land Courts, and on Proceedings Relating to The Environment and The Use and Occupation Of, And Title to Land and Proceedings in Other Courts (Gazette Notice No. 5178 of 2014) which provides:

> " During the inter-partes hearing of any interlocutory application, where appropriate, parties are encouraged to agree to maintain status quo. If they cannot agree, after considering the nature of the case or hearing both sides the Judge shall exercise discretion to order for status quo pending the hearing and determination of the suit bearing in mind the overriding interests of justice."

23. From the evidence that was tendered before the trial court it was alleged that the 1st, 2nd, 3rd and 5th Respondents are in occupation of the suit property. The 1st, 2nd, 3rd Respondents together with 5th Respondent have admitted in their respective affidavits being in occupation of the suit property and having undertaken some construction on the same. In view of the foregoing and considering the competing interest on the suit property it is only fair and for the interest of justice that an order of status quo be issued.

24. Consequently, a status quo order shall be issued directing the parties to maintain the current status as at the date of delivery of this decision and the same shall also be against the undertaking and or commencement of any construction in respect to the suit property pending the hearing and determination of the suit.

25. In respect to the costs of the appeal, the court has considered the fact that the Appeal has partially succeeded and shall direct each party to bear own costs of the appeal together with costs of the Appellant's application dated 30th September 2021.

26. In conclusion, the Appellant's appeal partially succeeds and the Ruling of the lower court is hereby set aside and substituted with the following orders:-

    a. Pending the hearing and determination of the suit Voi Chief Magistrate Court ELC Case No. E047 of 2021, Selina Msae Mjomba v Stephen Mwanjala & Others, a status quo order is hereby issued in respect to the unsurveyed piece of land measuring approximately 3.5 acres forming part of the larger portion of land collectively known as Sagalla/Kishamba "B"/1.

    b. For clarity, the status quo order issued herein shall apply to the effect that there shall be no transaction whatsoever including but not limited to transferring any proprietary interest

or undertaking any construction in respect to the suit property pending the hearing and determination of the suit.

c. There shall be no eviction of either party from the suit property pending the hearing and determination of the suit.

d. Each party to bear own costs of the Appeal and costs of the Appellant's application dated 30th September 2021 filed below the subordinate court.

e. The trial court file shall be returned to the subordinate court for hearing and determination of the pending suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 4TH DAY OF JULY, 2024.

E. K. WABWOTO

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of: -

N/A for the Appellant.

N/A for 1st, 2nd, 3rd and 5th Respondents.

Mr. Mwandoto for the 5th Respondent.

Court Assistants: Mary Ngoira and Norah Chao.