



**Cheboi & another v Kaino (Environment and Land Appeal
E001 of 2024) [2025] KEELC 157 (KLR) (28 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 157 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND APPEAL E001 OF 2024**

**L WAITHAKA, J
JANUARY 28, 2025**

BETWEEN

KIBOR CHEBOI 1ST APPELLANT

DAVID K KIBOR 2ND APPELLANT

AND

JOSEPH SUTER KAINO RESPONDENT

*(Being an appeal against the Judgment of Hon. Charles Kutwa SPM
delivered on 7th February 2024 in Iten PMCELC Case No.18 of 2020)*

JUDGMENT

Introduction

1. By a plaint dated 15th June 2020, the appellants instituted a suit before the lower court to wit, Iten PMC ELC Case No.18 of 2020 seeking judgment against the defendant now respondent for:-
 - a. A declaration that the sale agreement dated 5.5.2015 between the plaintiff's son-David Kimaiyo Kibor, the 2nd plaintiff and the defendant in respect of the suit property namely land parcel No. Arror-Center Plot measuring 45ft x 200ft is fraudulent, fake, null and void
 - b. An order of permanent injunction to stop and restrain the defendant from the plaintiffs' land namely Arror-Centre Plot measuring 45ft x 200ft.
 - c. Costs and interest.
 - d. Any other or further relief deemed fit in favour of the plaintiffs.
2. As can be discerned from the averments in the plaint, the suit was premised on the grounds that sometime in March 2019, the defendant chased away the plaintiffs' tenants and forcefully occupied the



suit property claiming to have bought the suit property from the plaintiffs. Terming the sale agreement dated 5th May 2015 relied on by the defendant to lay a claim on the suit property a forgery, the plaintiff instituted the suit hereto seeking the reliefs listed herein above.

3. The defendant filed a statement of defence and counterclaim dated 4th January 2022, in which he denied the allegations levelled against him. Through the counterclaim, the defendant pleaded that he was an innocent purchaser for value of the suit property from the 2nd plaintiff. The defendant lamented that the 2nd plaintiff had encroached on the suit property thereby interfering with his peaceful occupation of the suit property. By way of counterclaim, the defendant sought judgment against the plaintiffs for:-
 - a. The plaintiffs suit be struck out and/or be dismissed with costs to him;
 - b. A declaration that he, defendant, is the legal owner of the suit property;
 - c. An order of specific performance directed to the 2nd defendant to pay the plaintiff the sum of Kshs. 214,000/-;
 - d. An order of permanent injunction restraining the Plaintiff either by themselves, their servants, agents and/or any person claiming through them from encroaching and interfering with his peaceful enjoyment and possession of the suit property;
 - e. Costs of the counterclaim
 - f. Any other relief the honourable court may deem fit to grant.

Evidence

4. When the suit came up for hearing, the 2nd plaintiff, David Kimaiyo Kibor (P.W.1), relied on his witness statement dated 15th June 2020 after it was adopted as his evidence in chief. The statement is a restatement of the averments contained in the plaint. He produced the documents contained in his list of documents as Pexbt 1 to 5. He informed the court that the 1st plaintiff had passed away.
5. The defendant Joseph Suter, who testified as DW1, relied on his witness statement dated 4th January 2022 after it was adopted as his evidence in chief. He produced the documents contained in his list of documents, dated 4th January 2021 as Dexbt 1 to 9.
6. In cross examination, he informed the court that he bought the suit property from David K. Kibor (2nd plaintiff); that he signed the sale agreement (Dexbt 1) with the 2nd defendant in Omboto's firm; that he paid Kshs. 800,000/- and that he also paid a loan for the 2nd plaintiff of Kshs. 350,000/-.
7. He further informed the court that the plaintiffs' advocate was his advocate before he became the advocate for the plaintiffs and that in a letter the plaintiffs' advocate wrote for him, he agreed that he, the defendant, bought the suit property.
8. In re-examination, the defendant maintained that they did the sale agreement at Omboto's office and asserted that he paid a loan for the plaintiffs.
9. Upon considering the case urged before him, the trial magistrate held/observed:-

“...In the instant case, although the plaintiff's evidence was based on allegations that the defendant obtained the sale agreement fraudulently, they have not strictly speaking challenged the authenticity of the sale agreement held by the defendant. The agreement that was produced in court shows the land was sold by the 2nd plaintiff voluntarily to the



defendant. The plaintiff's advocate in the letter dated 24th March 2016 confirms the suit land belongs to the defendant. This position is reinforced by the letters dated 8th July 2019 and 26th August 2019 from the firm of Rioba Omboto and Company Advocates....From the evidence adduced in this case, it is not in dispute the defendant gained interest in the suit land by way of purchase from the plaintiffs. Upon purchase the defendant took possession and effected massive development thereon-built shops and rentals. The evidence also shows the 2nd plaintiff knew about the possession and use of the land by the defendant.

In the circumstances of this case, no evidence was led capable of proving that the sale agreement by both parties was a forgery. The evidence shows that the defendant is an innocent purchaser for value having bought the suit land from the 2nd plaintiff.

The defendant has therefore proved on a balance of probabilities that he is the owner of the suit land having bought it from the 2nd plaintiff. He has also proved that the 2nd plaintiff is a trespasser in the suit land. In the premises, I allow the defendant's claim in terms of a permanent injunction and a declaration that the suit land belongs to him. I also dismiss the plaintiffs' suit with costs to the defendant."

10. Aggrieved by the decision of the trial magistrate, the 2nd plaintiff appealed to this court on 17 grounds which can be condensed to two broad grounds namely, that the learned trial Magistrate erred by dismissing the plaintiffs' case and allowing that of the defendant and that the learned trial Magistrate was biased against the plaintiffs.
11. Pursuant to directions given on 3rd October 2024, the appeal was disposed off by way of written submissions.

Appellant's Submissions

12. In his submissions, two issues are framed for the court's determination. These are:-
 - i. Whether the appeal is merited; and
 - ii. Who bears the costs of the appeal.
13. On whether the appeal is merited, based on the restatement of the case (background and pleadings) and the authorities cited in his submissions, the appellant submits that they proved their case on a balance of probabilities.
14. It is the appellant's case that the trial magistrate erred in his analysis of evidence and pleadings, particularly on the issue regarding whether the respondent was an innocent purchaser for value of the suit property. Maintaining that the appellants had no relationship with the sale agreement dated 5th May 2015, the appellant submits that the learned trial magistrate was biased against the plaintiffs. He appears to base that accusation on the fact that the learned trial magistrate set aside the interlocutory judgment which the plaintiffs had obtained after the defendant/respondent failed to file a defence to the suit within the time stipulated in law. According to the appellant, the learned trial magistrate erred by allowing the respondent's application for setting aside the interlocutory judgment.
15. Terming the interlocutory Judgment he had obtained a regular judgment, which the trial magistrate ought not to have set aside, the appellant faults the learned trial magistrate for setting aside the judgment. The appellant claims that from the time the trial magistrate set aside his interlocutory judgment, the trial magistrate was biased against the plaintiffs/appellants.



16. On who should bear the costs of the appeal, the appellant urges this court to award him the costs of the appeal.
17. The respondent did not file submissions and if he did, the submissions were not placed in the court file.

Analysis and determination

18. In exercise of the duty vested in this court as a first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard, see *Selle & another vs. Associated Motor Boat Co. Ltd* (1968)E.A 123 and *Mwanasokoni vs. Kenya Bus Service Ltd* (1982-88)1 KAR and *Kiruga vs. Kiruga & Another* (1988)KLR 348.
19. As pointed out herein above, the appellants' case was premised on allegation/contention that the sale agreement dated 5th May 2015 allegedly signed between the 2nd plaintiff and the respondent, was a forgery /fraudulent document. Claiming that they were unaware of the sale agreement purportedly relied on by the defendant/respondent in support of his claim to the suit property, the plaintiffs/appellants pleaded that they became aware of the sale agreement when they went to report the dispute between them to the police. It was the appellants' case that the police gave them a copy of a sale agreement dated 5th May 2015, purportedly signed between the 2nd plaintiff and the defendant/respondent over the suit property.
20. Maintaining that the sale agreement relied on by the defendant/respondent was a forgery/fraudulent document, the plaintiffs pleaded that they lodged a complaint to the police to investigate the alleged forgery.
21. Acknowledging that the alleged forgery was not established by the police, the appellant appears to be blaming both the police and the defendant/respondent for their inability to prove the alleged fraud/forgery of the sale agreement.
22. In his defence and counterclaim, the defendant /respondent pleaded that he had entered into the impugned sale agreement with the 2nd plaintiff and that he had paid the full purchase price indicated in the sale agreement. He produced a copy of the sale agreement signed between him and the 2nd plaintiff. It is noteworthy, that other than claiming that the sale agreement was a fraudulent/forged document, the appellant did not object to the production of the agreement by the defendant /respondent. Besides production of the impugned agreement, the defendant/respondent produced a letter from the advocate who drew the agreement confirming that parties to the agreement appeared before him and executed the impugned agreement. The defendant /respondent also led evidence to the effect that there was a dispute between him and the appellant concerning entitlement to the suit property in 2016, way before the time indicated in the plaintiffs' pleadings as the time when the dispute between the plaintiffs and the defendant arose regarding entitlement to the suit property.
23. Upon review of the totality of the evidence adduced in this case against the applicable legal principles like the burden of proof and standard of proof, I do find that the plaintiffs failed to prove their pleaded case that the sale agreement relied on by the defendant/respondent was a forgery and/or fraudulent document. The defendant/respondent on the other hand, produced evidence that proved his pleaded defence and counterclaim.
24. With regard to the appellants' claim that the trial magistrate was biased against him, no evidence or material was placed before this court capable of supporting the appellants' claim that the learned trial



magistrate was biased against the plaintiffs/appellants. The mere fact that the learned trial magistrate set aside the interlocutory judgment that had been entered in favour of the plaintiffs/appellants for failure by the defendant/respondent to enter appearance and file defence is not a good ground for inferring bias on the part of the trial magistrate. In any event, the said judgment had been irregularly issued as the law does not contemplate that interlocutory judgment would be issued in land cases. In that regard, see the case of *Apollo Muinde & Others v Ernest Oyaya Okemba* (2019) e KLR where it was observed/held:-

“It is clear to me that the proceedings leading to the ex parte judgment were irregular. First, there is no provision for entry of interlocutory judgment in a case such as this. Interlocutory judgments, which are entered when no defence is filed, only apply to the matters specified under Order 10 Rule 6 of the 2010 Civil Procedure Rules. The said provision is drawn as follows :-

Interlocutory judgment [Order 10, rule 6.]

Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.

5. It will be seen from the above that interlocutory judgment only applies in claims for pecuniary damages only, or a claim for detention of goods with or without a claim for pecuniary damages. If the defendant does not enter appearance in such a claim, or enters appearance and does not file a defence (a situation covered by Order 10 Rule 7) the plaintiff may apply for interlocutory judgment, which can be entered and then set down the suit for assessment of damages. The so called “formal proof” is thus nothing beyond a hearing for assessment of damages in a case where one is seeking pecuniary damages and/or seeking damages for detention of goods.
6. The claim before this court was not one seeking pecuniary damages and neither was it one that was a claim for detained goods. It was a case seeking declaration of ownership of land and a mandatory injunction. Those are not prayers upon which one can apply for interlocutory judgment. In a situation where no appearance is filed to such a suit, or an appearance is filed and no defence is filed within the specified period, the avenue of the plaintiff is to apply for a date for hearing, and even then, since he has no interlocutory judgment in his favour, he needs to serve the defendant with a hearing notice, unless the court orders otherwise, for the matter will actually be proceeding for full hearing on merits and the defendant needs to be informed of this and opt whether to attend or not. If the defendant has actually made an appearance, then clearly, he must be served through his counsel, if he has one, or if in person, he must be personally served. “Formal proof” cannot be undertaken in a case where one claims a declaration of ownership of land or is seeking



orders of permanent and/or mandatory injunction, or such other related claims.”

25. I note with concern that it is the plaintiffs/appellants’ counsel who wrote the defendant/respondent’s demand letter in 2016. In what would appear to be a clear case of conflict of interest against the appellants’ counsel, the appellants’ counsel took up a case against his earlier client (defendant) in circumstances that may have necessitated his appearance in court to shade light on the issues raised in the suit. By participating in a case where the circumstances warranted his being called by one of the parties as a witness, the appellants’ advocate risked breaching the duty imposed on him of not disclosing privileged information disclosed in the course of representation of his clients.
26. The upshot of the foregoing is that the appeal herein has no merits. Consequently, I dismiss it with costs to the respondent.
27. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT ITEN THIS 28TH DAY OF JANUARY, 2025.

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:-

Mr. Cheptarus for the appellant

Mr. Barmao for the respondent

Court Assistant: Christine

