Ndambiri & 3 others v Mugo (Environment and Land Appeal 17 of 2018) [2023] KEELC 16335 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16335 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ENVIRONMENT AND LAND APPEAL 17 OF 2018

JM MUTUNGI, J

MARCH 16, 2023

BETWEEN

OCTAVIO NDAMBIRI ..... 1ST APPELLANT

FREDRICK MAGOTO ..... 2ND APPELLANT

MBOGO NGARI ..... 3RD APPELLANT

CYRUS KATHIRU MAGONDU ..... 4TH APPELLANT

AND

SIMON GACHOKI MUGO ..... RESPONDENT

(Arising from the Judgment delivered on 6th December, 2017 by Hon. Y. M. Barasa – RM in Kerugoya CMCC No. 296 of 2012)

JUDGMENT

1. The Appellants have instituted the present Appeal against the Judgment delivered by Hon. Y. M. Barasa(RM) in Kerugoya CMCC No 296 of 2012 on the 6th December, 2017. By the Judgment the Learned Trial Magistrate entered Judgment in favour of Plaintiff now Respondent in the Appeal and was awarded the costs of the suit. The Learned Trial Magistrate ordered the names of the Defendants now Appellants in the Appeal to be cancelled from the ownership of plot No 6 Karumandi, Kirinyaga County and further ordered the dismissal of the Appellants Counter Claim with no order as to costs.

2. The Appellants being dissatisfied and aggrieved by the Judgment have appealed to this court on the following seven grounds set out in the Memorandum of Appeal.

    1. That Learned Trial Magistrate erred in Law and fact in making Judgment against the weight of evidence.

2. That Learned Trial Magistrate erred in Law and fact in failing to fairly consider the Appellants' Counter Claim while making the Judgment.

3. That Learned Trial Magistrate erred in Law and fact in failing to consider that the Judgment made on 6th December, 2017 was unlawful because the County Government of Kirinyaga had not been enjoined as a party in the proceedings.

4. That Learned Trial Magistrate erred in Law and fact in disregarding the fact that the parties had another related and pending suit which was not determined, Kerugoya CMC No 278 of2012.

5. That Learned Trial Magistrate erred in Law and fact in failing to consider all the documents and evidence tendered by the Appellants.

6. That Learned Trial Magistrate erred in Law and fact in failing to find that the Appellants' evidence was neither rebutted nor challenged.

7. That Learned Trial Magistrate erred in Law and fact in failing to find that he did not have Jurisdiction to hear and determine the Respondent's claim and therefore the Judgment made on 6th December, 2017 was null and Void.

3. The brief facts of the case before the subordinate Court are set out herein below.

4. The Respondent who was the Plaintiff before the Lower Court filed a Plaint dated 12th October, 2012 praying for orders:-

   a. The cancellation of the Defendants names from Plot No 6 Karumandi.

   b. Cost of the suit.

   c. Any other relief the court deemed fit and proper to grant.

5. The Respondent claimed that he was the registered owner of the suit plot following succession proceedings vide Gichugu Magistrate's Court Succession Cause No 10 of 2007 after the death of his father Kibaki Muriuki. He averred a grant was confirmed to him as the beneficiary entitled to inherit the plot. The Respondent further averred that after he was registered as owner, the Appellants somehow caused themselves to be registered as co-owners of the plot without his consent and/or knowledge. After efforts to resolve the dispute failed to materialise the Respondent instituted the suit before the Lower Court.

6. The Appellants denied the Respondents averments in the Plaint stating that they had been registered owners of the plot since 1971 and they had been paying rates for the plot. In the Counter Claim the Appellants claimed that the Respondent had fraudulently withdrawn a sum of Kshs 64,692/10 from their bank account which he failed to refund even after promising he would do so. The Appellants prayed for dismissal of the suit, general damages on the Counter Claim and costs of the suit.

7. As per the record the suit was initially heard before the Learned Trial Magistrate on 17/1/2016 when the Respondent and the Appellants gave evidence. The Appellants counsel was not present during the hearing but the Respondent's Counsel was present. Judgment in the matter was delivered on 4th May, 2016 in favour of the Respondent. The Appellants however, applied to have the Judgment reviewed and/or set aside and for the case to be reopened to enable them tender their evidence. The Learned Trial Magistrate in a considered ruling delivered on 1st July, 2016 set aside the Judgment and granted leave to the Defendants to tender their evidence. Subsequently when the matter was listed for hearing on 15/11/2017, the parties agreed to dispense with Viva voce evidence and to have the witness statements adopted as filed. The trial court proceeded to adopt the statements and directed the Advocates to

file their written submissions which the Advocates did. The trial Court after evaluating the evidence delivered the impugned Judgment on 6th December, 2017.

8. This being an Appellate Court of first instance is under a duty and indeed obligated to re-evaluate the evidence and make its own findings and/or conclusions and is not bound by the findings reached by the Lower Court. This is in keeping with the Principle eanciated by the Court of Appeal in the Case of *Selle & another v Associated Motor Boat Co. Ltd & others* [1968] EA 123 where the Court stated as follows:-

> "……this Court is not bound necessarily to accept the findings of fact by the court below. An Appeal to this 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 allowance in this respect."

Evidence of The Parties.

9. The Respondent's evidence before the Lower Court was to the effect that his deceased father Joel Kiragi alias Kibaki Muriuki was allocated Plot No 6 Karumandi by the County Council of Kirinyaga. He produced in evidence a letter of allotment dated 28/8/1971. He stated his late father was utilising the plot until his death in 1997. The Plaintiff after his father's death filed succession and plot No Karumandi was vide a confirmed grant issued in Gichugu SRM Succession Cause No 10 of 2007 on 9th July, 2008 was given to him. He stated he got registered as the owner but thereafter the names of the Appellants were added as Co-owners without his consent and/or knowledge. He stated further that when he attempted to get the issue of ownership resolved by the Kirinyaga County Council, the Appellants failed to respond to the summons when they were summoned by the Clerk precipitating the institution of the suit before the Lower Court.

10. The 2nd and 3rd Appellants filed witness statements dated 24/7/2013. The Appellants as per the statement stated they were co-owners of plot No 6 Karumandi with the Respondent. They asserted that they were Co-owners by virtue of a lease dated 31/7/1973 and that they had been paying rates for the plot all along. They claimed that the Respondent wanted to dispossess them of the plot. The Respondent and the Appellants had filed bundles of documents which the Learned Trial Magistrate was bound to consider and evaluate in reaching his determination.

11. The Learned Trial Magistrate upon evaluation and analysis of the evidence, the exhibits and the submissions by Counsel made a finding to the effect that the allotment letter dated 28/8/71 produced by the Respondent showed that Plot No 6 Karumandi was allocated to the late Joel Kirangi who was the Respondent's father. The Learned Trial Magistrate further noted though the extract of minutes of 30/3/71 exhibited by the Appellants approved allotment of the plot to the Appellants and the Respondent's father jointly, no allotment letter was issued to pursuant to that approval. Instead the allotment letter was issued to the Respondent's late father signifying there was a change. The Learned Trial Magistrate further noted the Respondent had exhibited a certificate of Confirmation of Grant denoting that he had inherited Plot No 6 Karumandi from his late father, and the Kirinyaga County Council vide an extract of Minutes of 17/9/2009 approved the change of ownership from the Respondent's father's name to his name. The Learned Trial Magistrate on the basis of his evaluation of the evidence came to the conclusion that the Respondent had demonstrated how he came to own the property in question and held that the Respondent had on a balance of probabilities proved his ownership of the suit property and proceeded to grant Judgment in his favour.

Submissions of The Parties.

12. The Appeal was canvassed by way of written submissions. The Appellants have submitted that there were contradictions in the Respondent's pleading pointing to the averment in the Plaint that the Respondent claimed he was the registered owner of plot No 6 at Karumandi yet in the prayers he sought to have the Appellant's names cancelled from the registration. The Appellants pointed out in the pleadings there was no averment that the Respondent's late father was at any time registered as owner of the property and therefore contended evidence ought not to have been adduced as to how the Respondent's late father came to own the property. The Appellants argued that parties are bound by their pleadings and the evidence should have been disallowed. The Appellants relied on the Case of *Raila Amolo Ondinga & another v IEBC & 2 others* [2017] eKLR and *IEBC & another v Stephen Mutinda Mule & 3 others* [2014] eKLR to support this submission.

13. The Appellants submitted that the Learned Trial Magistrate erred in finding that the allotment letter of 28/81971 superseded the extract of the minutes of 30th March, 1971 approving allotment jointly to the Appellants and the Respondent's father. They argued that where there were two competing equities which are equal as in the instant matter, the first in time prevailed. For this proposition the Appellants place reliance on the Case of *Salome Warware v George Muna & another* [2015] eKLR where the court stated:-

> "Neither the Appellant or the Respondent produced documents of ownership. What was produced were the documents showing that they were both allocated the plot to commence the process of acquiring title. The County Council was the owner of the land hence rightfully issued letters of allotment but either inadvertently or mischievously issued the same to two different persons to be transmitted to the Commissioner of Lands for issuance of title as was the procedure. Title has not been issued to either the Appellants or the Respondent by the Commissioner of Lands.
>
> This is a case where the Appellant sought an equitable remedy of injunction in the Lower Court. It is trite Law based on equitable principles that where two equities are equal, the first in time prevails. This principle applies where the Law is not clear".

14. The Appellants further submitted that the Learned Trial Magistrate disregard the evidence presented by the Appellants as related to the ownership of the plot and in support of the Appellants Counter Claim. The Appellants stated that the Trial Magistrate paid no regard to the evidence relating to the succession proceedings undertaken by the 4th Appellant whereby she inherited her late husband's share in the suit plot and further the Court paid no regard to the agreement between the Respondent and the Appellants whereby the Respondent agreed to refund Kshs 64,692.10/- that he had unlawfully withdrawn from their joint business at Plot No 6 Karumandi.

15. The Appellants finally submitted that the Learned Trial Magistrate handled the matter when he had no jurisdiction to hear and determine the case. The Appellants made reference to Section 26(3) and (4) of the *Environment and Land Court Act*, 2011 and pointed out that the Learned Trial Magistrate had not been appointed by the Hon. Chief Justice and Gazetted as one of those Magistrates who could handle Environment and Land matters and hence at the time he made the Judgment on 6th December, 2017 he was not seized of any jurisdiction.

16. The Respondent in his submissions maintained that the Learned Trial Magistrate's Judgment was sound and well grounded. The Respondent argued there was no contradiction or inconsistency in the evidence of the Respondent and that the Learned Magistrate properly evaluated and relied on the

evidence to reach the decision that he did. The Respondent contended the Learned Trial Magistrate had the requisite jurisdiction and that the Appellants at any rate never raised the issue of jurisdiction before the Lower Court but rather submitted to the Court's jurisdiction including by presenting a Counter Claim to be heard and determined by the Court.

17. The Appellants in Supplementary submissions filed on 11th April, 2022 argued that parties cannot confer jurisdiction to a Court by consent and contended that the issue of Jurisdiction could be raised at any time including even on Appeal. In support of this position the Appellants placed reliance on the Case of *Southern Star Sacco Ltd v Vanancio Ntwiga* [2021] eKLR where Gitari, J cited with approval the holding by the Supreme Court In the matter of Advisory Opinion of the Court under Article 163 of the *Constitution* Application No 2 of 2011 at Paragraph 30 where the Court held:-

> "It is trite Law that a Court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavours to discern or interpret the intentions of Parliament, where the Legislation is clear and there is not ambiguity."

18. The Supreme Court further in the Case of *Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 others* [2012]eKLR stated as follows pertaining to jurisdiction:-

> "A Court's jurisdiction flows from the *Constitution* or Legislation or both. Thus a Court of Law can only exercise jurisdiction as conferred by the *Constitution* or other written Law. It cannot arrogate itself jurisdiction exceeding that which is conferred by Law."

19. I have evaluated the evidence and I have considered the submissions of the parties and this Appeal turns, firstly, on whether having regard to the totality of the evidence the Learned Trial Magistrate was justified to reach the decision that he did, and, secondly, whether he was seized of jurisdiction to deal with the matter.

20. On the evidence, it is clear the Appellants pegged their claim to ownership of Plot No 6 Karumandi to an extract of the Kirinyaga County Council minutes of Committee meeting held on 16/3/1971 and 30/3/1971 touching on allocation of plots which indicated approval was given for them to be allocated the plot jointly with Joep Kirangi (Respondent's deceased father). Though approval for allocation of the plot to the group was given, there was no evidence a Letter of Allotment was issued for the plot to the group. In my view an approval for allocation cannot of itself constitute allocation of the subject plot and would not confer any interest over the said plot until a formal letter of allotment is issued and the terms of the offer/allotment accepted by the allottee. The uncontroverted evidence was that the Respondent's deceased father was singularly issued with a letter of Allotment for plot No 6 Karumandi dated 28th August,1971. This letter of allotment vested the proprietary rights over the said plot to the Respondent's Deceased father and no one else. The approval for allocation of the plot to the Appellants together with the Respondent's father as per the minute's extract of 30/3/1971 was never actualised to a formal allotment of the plot and therefore created no proprietary interest over the plot in favour of the Appellants.

21. Indeed, following the death of his father, the Respondent took out Letters of Administration in Succession Cause No 10 of 2007 at Gichugu Senior Principal Magistrate's Court and was pursuant to a Confirmed Grant given Plot No 6 Karumandi as beneficiary and was registered as proprietor by

the County Council after due approval. The extract of the Council meeting held on 11th September, 2009 was as follows:

> " An application for change of name on Plot No 6 Karumandi from Kibaki Muriuki to read Simon Gachoki Mbogo as per Succession Cause 10/2007 was considered and approved."

22. There was no clear evidence as to how the Appellant's got to be registered as joint proprietors with the Respondent's deceased father and the Respondent when their names were not included in the Letter of allotment. The record however indicated the Appellants names were entered into the County Council records after the Respondent was registered. On the basis of the evidence, it is my view that the Learned Trial Magistrate was justified in his holding that the Respondent had demonstrated how he acquired ownership of the plot in question and that the Appellants had not been able to satisfactorily show how they acquired ownership of the plot. As I have observed earlier in this Judgment, mere approval for allocation cannot confer an interest. An allotment letter is a prerequisite for an interest in land being passed.

23. The Appellants in their Memorandum of Appeal and submissions have faulted the trial Magistrate for dismissing their Counter Claim. The Appellants in the Counter Claim pleaded the Respondent had fraudulently withdrawn money from their account and further had fraudulently procured a grant certificate which had caused them "to suffer inconvenience, mental suffering and anguish...." For which reason they claimed general damages. No particulars of the alleged fraud were pleaded and there was no evidence adduced to substantiate the claim for general damages. There was no claim for refund of any money and the Lower Court could not have properly made an order for any refund as none was sought or prayed for. The Court therefore properly found the Counter Claim not proved on a balance of probabilities and was right in dismissing the same.

24. Turning to the question whether or not the Learned Trial Magistrate had jurisdiction, it is my considered view that the Trial Magistrate had jurisdiction to handle the matter for the following reasons.

25. The suit in the lower Court was filed vide the Plaint dated 12th October, 2012 on 16th October, 2012. As at the time the suit was filed the Environment and Land Court had not been established as no Judges had been appointed and sworn in to serve in that Court. The Court takes Judicial Notice that the 15 inaugural Judges of the ELC, Court were sworn into Office on 5th November, 2012 and therefore the Court became constituted as from that date.

26. Prior to the establishment and Constitution of the ELC Court, Magistrates Courts were exercising jurisdiction over land matters provided the land fell within their pecuniary jurisdiction as was provided under Section 159 of the *Registered Land Act*, Cap 300 Laws of Kenya (now repealed). Section 159 of the Act provided as follows:-

> " Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court, or, where the dispute comes within the provisions of section 3 (1) of the Land Disputes Tribunals Act in accordance with that Act."

27. After the enactment of the *Environment and Land Court Act* 2011 and the establishment of the Court, the Hon. Chief Justice under Section 30 of the *ELC Act* was empowered to issue practice directions

respecting the conduct of Land matters pending before the various Courts and Tribunals. Section 30 of the *ELC Act* provides as follows:

> 30
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> (1) All proceedings relating to the environment or to the use and occupation and title to land pending before any Court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.
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> (2) The Chief Justice may, after the Court is established, refer part-heard cases, where appropriate, to the Court.
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> The Hon. Chief Justice vide Gazette Notice No 16268 dated 9th November, 2012 issued Practice Directions on proceedings relating to the Environment and the use and Occupation of and Title to Land. Direction 7 in the Practice Directions provided as follows:-
>
> > "7. Magistrates Courts shall continue to hear and determine all cases relating to the Environment and the use and occupation of, and title to land(whether pending or new) in which the Courts have the requisite pecuniary jurisdiction."

28. The amendment to the *ELC Act* and the *Magistrates Courts Act* in 2015 requiring the Hon. Chief Justice to Gazette Magistrates to handle Environment and Land matters did not in my view affect the matters that were already pending and being heard by Magistrates. Section 26 of the *Environment and Land Court Act*, was amended by the insertion of a new Subsection (3) and (4) as follows:

> (3) The Chief Justice may by notice in the Gazette, appoint certain Magistrates to preside over cases involving Environment and Land matters of any area of the Country.
>
> (4) Subject to Article 169(2) of the *Constitution*, the Magistrates appointed under Subsection (3) shall have jurisdiction and power to handle-
>
> (a) Disputes relating to offences defined in any of Parliament dealing with Environment and Land, and
>
> (b) matters of Civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the *Magistrates' Courts Act*.

Before the Amendment to the *ELC Act* to provide for the jurisdiction of the Magistrates, there had been myriad questions as to whether or not the Magistrates' Courts had jurisdiction to handle Environment and Land matters having regard to the provisions of Article 162 (2)(b) of the *Constitution* which appeared to vest such jurisdiction exclusively in the Environment and Land Court established thereunder. It took the intervention of the Court of Appeal in the Case of *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others* [2017] eKLR to confirm that indeed, the Magistrate's Court

had jurisdiction to handle Environment and Land matters. The Supreme Court of Kenya likewise in the Case of *Republic v Karisa Chengo & 2 others* [2017] eKLR put to rest the issue of jurisdiction regarding the High Court and the Environment and Land Court that had beleaguered the two courts.

29. From the foregoing its apparent issues of jurisdiction of the Courts, had as it were, been a source of conflict until the issue was settled by the two decisions of the Court of Appeal and the Supreme Court which were handed down in 2017. Before the decisions were rendered the Practice Directions issued by the Chief Justice to the extent permissible guided the jurisdiction of the Magistrates Courts. Having considered the applicable Law and the Practice Directions issued by the Chief Justice I am persuaded the Learned Trial Magistrate properly exercised jurisdiction to deal with the matter. The authorities cited by the Appellant on the issue of jurisdiction are in my view not applicable to the facts and circumstances of this matter.

30. The Upshot is that I find no merit in the Appeal and the same is ordered dismissed with costs to the Respondent.

JUDGMENT DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 16th DAY OF MARCH, 2023.

JOHN M. MUTUNGI

E.L.C JUDGE