



**Njihia & another v Njoroge (Environment and Land Appeal
15 of 2021) [2023] KEELC 17424 (KLR) (15 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17424 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 15 OF 2021**

BM EBOSO, J

MAY 15, 2023

BETWEEN

LUCY WANJIRU NJIHIA 1ST APPELLANT

GITHUNGURI CONSTITUENCY RANCHING CO LTD 2ND APPELLANT

AND

SHELMITH WANJA NJOROGE RESPONDENT

(Being an Appeal arising from the Judgment of Hon. J. A. Agonda (PM) delivered at Ruiru Senior Principal Magistrate Court on 21/1/2021 in Ruiru MCL & E No 34 of 2019)

JUDGMENT

Background

1. This appeal challenges the Judgment rendered by Hon J. A Agonda, PM, on 21/1/2021 in Ruiru MCL & E Case No 34 of 2019. The dispute in the trial court revolved around the question of ownership of land parcel number Ruiru/Kiu Block 2 (Githunguri)/3743. Before I analyze and dispose the key issues that fall for determination in the appeal, I will outline a brief contextual background to the appeal.
2. Through a plaint dated 16/5/2019, Shelmith Wanja Njoroge [the respondent] sued Lucy Wanjiru Njihia [the 1st appellant] and Githunguri Constituency Ranching Company Ltd [the 2nd appellant] seeking a permanent injunction restraining them against trespassing on, dealing or interfering with, alienating or disposing the suit property. Her case was that she purchased the suit property from one Paul Kariro Kabogo in the year 2000, and that upon the 2nd appellant issuing her with share certificates and a clearance certificate, she was registered as proprietor of the suit property in November 2011. She further contended that she had been in possession of the suit property since the year 2000 and she had developed the suit property. It was her case that in April 2019, she received a letter from the 2nd appellant, summoning her to respond to a claim made over the suit property by the 1st respondent and she attended a meeting at the 2nd appellant's office where she presented her documents, of ownership,



including the share certificates, receipt and clearance certificate which the 2nd appellant had issued to her to facilitate her registration as proprietor of the suit property.

3. The 1st appellant filed a statement of defence and counterclaim dated 11/9/2019, in which she contended that she was the legitimate owner of the suit property. It was her case that the suit property was bequeathed to her as a gift by the late Ruth Njeri Kabogo prior to her death in 1997. She contended that registration of the suit property in the name of the respondent was procured through fraud on part of the respondent and the Land Registrar. By way of counterclaim, she prayed for an order dismissing the respondent's suit; a permanent injunction restraining the respondent against constructing on or selling the suit property; a declaration that the respondent's title was obtained fraudulently; an order directing demolition of the respondent's building erected on the suit property; general damages "for trespass and conversion", and costs of the suit.
4. The 1st appellant contended before the trial court that she lost and/or misplaced the original documents of ownership [ballot card and share certificate held in the name of Ruth Njeri Kabogo].
5. The 2nd appellant filed a statement of defence dated 6/11/2019, in which they averred that the registration of the suit property in the name of the respondent must have been obtained through fraud and misrepresentation hence the registration was void ab initio. They further contended that the suit property belonged to Ruth Njeri Kabogo and had never belonged to Paul Kariro Kabogo. The 2nd appellant added that if any of their officials issued a clearance certificate to facilitate registration of the suit property in the name of the respondent, they did so irregularly because their term ended in 1996 hence they had no mandate to issue the clearance certificate.
6. The Land Registrar was named as the 2nd defendant in the counterclaim by the 1st appellant. He filed a defence dated 27/11/2019 through the Attorney General. He denied the 1st appellant's allegations of fraud and/or collusion. It was the Land Registrar's case that he caused the suit property to be registered in the name of the respondent on the basis of documents which had been presented to him.
7. Trial proceeded before Hon J. A Agonda and parties subsequently filed written submissions. The impugned Judgment was subsequently rendered. The trial court found that the respondent had proved her case against the appellants and issued orders declaring the respondent as the lawful owner of the suit property and restraining the appellants against interfering with her quiet possession of the suit property. In addition, the trial court found that the 1st appellant failed to prove her counterclaim. The trial court dismissed the 1st appellant's counterclaim and awarded the respondent costs of the primary suit and the counterclaim.

Appeal

8. Aggrieved by the findings and disposal orders of the trial court, the two appellants bought this appeal, advancing the following sixteen (16) verbatim grounds of appeal:
 1. That the learned trial magistrate erred in law and fact when she relied and held the respondent registration to land parcel Ruiru Kiu Block 2 (Githunguri)/3743 is a first registration therefore incapable of cancellation contrary to the Land Registration Act 2012 and therefore a misapprehended the law thereby arriving at erroneous decision.
 2. That the learned trial magistrate erred in law and fact for failing to analyse or understand how land held by way of ballots and shares at Githunguri Constituency Ranching Company Limited (herein after referred to as the Company) is transferred from one shareholder to the other and all the processes of transmission in case of a deceased shareholder thereby arriving at a wrong decision.



3. That the learned trial magistrate erred in law and in fact by failing in misquoting the evidence of the land registrar that land parcel RUIRU KIU subsequently to a certificate of lease whilst the land falls within a freehold block giving rise to a title deed thereby arriving at a grossly erroneous decision.
4. That the learned trial magistrate erred in law and in fact in holding that the respondent certificate of lease was acquired genuinely and was above board and compliant with Section 26 of the Land Registration Act whilst she holds a certificate of lease in land marked for a freehold title thereby arriving at an erroneous decision.
5. That the learned trial magistrate erred in law and in fact when she failed to analyze, investigate, or critic the manner in which a freehold title can be converted into a certificate of lease and whether the respondent had followed such steps or tendered any evidence that she ever held the land via freehold title before converting the same into a certificate of lease thereby arriving at an erroneous decision.
6. That the learned trial magistrate erred in law and in fact when she failed to analyze or understand the evidence of the chairman of the company who stated that the signatories of the respondent documents being a share certificate namely SARA and WANJIRU had already left the office or were ousted directors incapable of using or signing the share certificate and also failed to scrutinize and understand the documents filed by the 2nd appellant thereby arriving an erroneous decision.
7. That the learned trial magistrate erred in law and in fact by holding that the respondent had a ballot issued by the company without the production of any in court thereby arrived at an erroneous decision.
8. That the learned trial magistrate erred in law and in fact by failing to note that the purported seller one Paul Kariro Kabogo the seller of the land to the respondent had no land to sell since he did not have any share certificate, any ballot nor receipt nor did his name reflect in the company register nor any evidence as to how he owned the suit parcel hence could not sell or transfer what he did not have to the respondent thereby arriving at an erroneous decision.
9. That the learned trial magistrate erred in law and in fact by ignoring or without putting into consideration the evidence of the administrator of the suit parcel was not or could not form part of the deceased estate since it had been agreed that it be transferred to the 1st appellant Lucy Wanjiku Njihia thereby arriving at an erroneous decision.
10. That the learned trial magistrate erred in law and in fact by failing to appreciate the 2nd appellant is a limited liability company and land held by them is by way of shares and the company is not governed by law of Succession Act cap 160 but the Company Act thereby arriving at an erroneous decision.
11. That the trial magistrate erred in law as fact by failing to analyze the pleading filed by the parties especially the attributes as to fraud documents having been signed by ousted officials, certificate of lease issued to the respondent instead of a freehold title in a land meant for freehold title thereby arriving at an erroneous decision.
12. That the learned trial magistrate erred in law and in fact by placing much weight on unpleaded matters of gift inter vivos without analyzing the evidence to the fact that as per the records of the company the land was still in the names of the deceased allottee one Ruth Njeri Kabogo and had never been transferred to any other person and thereby arriving at an erroneous decision.



13. That the learned trial magistrate erred in law and fact by failing to appreciate the fact that no contrary evidence was adduced to the effect that the land was not bequeathed to 1st appellant by its owner Ruth Njeri Kabogo thereby arriving at erroneous decision.
 14. That the learned trial magistrate erred in law and fact by putting weight on irrelevant evidence and failed to fully understand the case or issues discerned from the pleadings thereby arriving at a grievous wrong decision.
 15. That the learned magistrate erred in law and in fact in framing of her issues in the judgment as issues of 1st registration were never canvassed in the hearing of the case and thereby dealt with wrong issues and contrary to the *Land Registration Act* 2012 which calls for nullification of 1st registration title thereby arriving at an erroneous decision.
 16. That the learned trial magistrate generally failed to appreciate the law, evidence, authorities tendered by the appellant and underestimating the same and was therefore wrong in her decision.
9. The appellant urged the court to set aside the Judgment of the trial court and substitute it with an award in favour of the 1st appellant in terms of the counterclaim.

Appellant's Submissions

10. The appellants canvassed the appeal through written submissions dated 27/5/2022, filed by M/s Kanyi Kiruchi & Co Advocates. Counsel for the appellants itemized the following as the six issues that fell for determination in the appeal: (i) Whether Ruth Njeri Kabogo transferred Ballot No 1548 to her stepson, Paul Kariro Kabogo; (ii) Whether Paul Kariro Kabogo became the owner of the land to enable him sell or transfer the land to the respondent; (iii) Whether the 1st appellant was gifted the land by Ruth Njeri Kabogo; (iv) Whether the respondent's registration as proprietor of the land was fraudulent; (v) Whether this appeal should succeed; (vi) Who should bear costs in the lower court and in this appeal.
11. On whether Ruth Njeri Kabogo transferred Ballot No 1548 to her stepson, Paul Kariro Kabogo, counsel submitted that it was the obligation of the respondent to demonstrate to the trial court that the late Ruth Njeri Kabogo transferred the suit property to Paul Kariro Kabogo and further that the latter held valid documents which entitled him to sell and transfer the suit property to the respondent. Counsel contended that the respondent failed to discharge that obligation.
12. On whether Paul Kariro Kabogo became the owner of the suit property so as to be able to sell or transfer it to the respondent, counsel reiterated his submissions on the preceding issue and argued that Paul Kariro Kabogo had no valid documents to enable him transfer the suit property to the respondent. Counsel contended that Ruth Njeri Kabogo's shares were never transferred to Paul Kariro Kabogo, hence the latter could not purport to sell the land to the respondent.
13. On whether the 1st appellant was gifted the suit property by Ruth Njeri Kabogo, counsel for the appellants submitted that the fact that the suit property was not itemized in the succession cause relating to Ruth Kabogo's estate as one of her assets was evidence that the suit property had been gifted to the 1st appellant. Counsel added that the fact that the 1st appellant was excluded from the list of beneficiaries during the confirmation of grant was further evidence that she had been gifted the suit property.
14. On whether the respondent's registration as proprietor of the suit property was fraudulent, counsel cited section 26(1) of the *Land Registration Act* and added that an examination of the root of the respondent's title revealed that she acquired her title from Paul Kariro Kabogo who had no lawful



title to sell to her. Counsel added that the respondent failed to produce evidence of the alleged sale agreement between her and Paul Kariro Kabogo. Counsel argued that the current Chairman of the 2nd appellant produced a register which showed that as at the time of trial, the suit property was still held in the name of Ruth Njeri Kabogo and had never been transferred to Paul Kariro Kabogo. Counsel added that the person who issued the share certificates and the clearance certificate which the respondent used to procure registration of the suit property in her name were not directors of the 2nd appellant as they had been ousted from office. Counsel added that share certificate No NB 8024 dated 16/9/2000 was fake because it was intended to be issued in the year “19” but numerals “19.....” had been cancelled and replaced with year “2000”. Counsel further argued that the suit property was registered as a lease yet it fell within a freehold area. Counsel argued that there was no evidence of change of user to warrant change of tenure from freehold to leasehold.

15. Counsel submitted that the appellants’ appeal had merit and urged the court to allow it and award the appellants costs of the suit in the trial court and costs of this appeal.

Respondent’s Submissions

16. The respondent filed written submissions dated 16/6/2022 through M/s Kiarie Kimani & Company Advocates. Counsel for the respondent identified the following as the issues that fell for determination in the appeal: (i) Whether the appeal is valid; (ii) Whether the appellants proved the allegation of fraud; (iii) What is the position of the law with regard to intervivos gifts; (iv) Who is the rightful owner of the suit property; (v) What is the relevance of the suit property land tenure in this appeal? (vi) Did the trial court err in delivering a judgment in favour of the respondent and in dismissing the 1st appellant’s counterclaim; and (vii) Who should bear costs of this appeal.
17. On the validity of the appeal, counsel for the respondent submitted that the 1st appellant brought a counterclaim and sued the Land Registrar as a 2nd defendant in her counterclaim and pleaded fraud and collusion against the Land Registrar. He added that in this appeal, the appellant invited the court to find the allegations of fraud and collusion as sufficiently proved and enter judgment against the respondent and the Land Registrar as prayed in the counterclaim. Counsel contended that it was not possible for this court to re-evaluate the evidence tendered during trial and grant the reliefs sought in the counterclaim in the absence of the Land Registrar who was a 2nd defendant in the counterclaim. Counsel contended that failure to join the Land Registrar as a party in this appeal was fatal. Counsel urged the court to dismiss the appeal on the above ground.
18. On whether the appellants had sufficiently proved the allegations of fraud, counsel submitted that the appellants failed to prove fraud as pleaded. Counsel added that whereas DW1 testified in his evidence-in-chief that the directors who signed the share certificates and the clearance certificate leading to the registration of the respondent as proprietor of the suit property had been ousted from office, he conceded during cross-examination that he did not have documentary evidence relating to the directorship of the company as at the date when the impugned share and clearance certificates were issued. Counsel added that DW1 failed to tender minutes relating to the alleged ouster of the directors.
19. On the question as to the position of the land in relation to intervivos gifts, counsel cited the decision of the High Court *in Re Estate of the Late Gideon Manthi Nzioka [deceased]* [2015] eKLR in which the court held thus:

“For gift intervivos, the requirement of the law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by



way of registered transfer, or if the land is not registered it must be in writing or a declaration of trust in writing. Gift intervivos must be complete for the same to be valid.”

20. Counsel argued that the appellants had failed to satisfy the trial court on the above requirements hence they had failed to prove the allegation that the suit property was gifted intervivos to the 1st appellant by the late Ruth Njeri Kabogo.
21. On the question as to who is the rightful owner of the suit property, counsel for the respondent submitted that the respondent tendered evidence demonstrating that he purchased the suit property from Paul Kariro Kabogo after the 2nd appellant had confirmed that the said Paul Kariro Kabogo was the owner of the suit property at the time. Counsel added that the respondent demonstrated that upon purchasing the suit property, the 2nd appellant issued her with share certificate number B8024 on 16/9/2000 and when the said share certificate got lost, the 2nd appellant issued her with a replacement certificate in May 2005. Counsel further argued that the respondent demonstrated that the 2nd appellant issued her with a clearance certificate which enabled her to process registration of the suit property in her name.
22. Counsel for the respondent added that DW1 on whose evidence the appellant relied was not a credible witness because he did not demonstrate that he was a director of the 2nd appellant, and that he did not produce evidence demonstrating that the directors who issued the impugned share and clearance certificates had been ousted from the company. Counsel added that the appellant failed to demonstrate that the 1st appellant was bequeathed the suit property as a gift inter vivos. Counsel urged the court to find that the respondent was the rightful proprietor of the suit property.
23. On the relevance of the suit property’s tenure to the dispute before the trial court, counsel for the respondent submitted that the issue relating to the tenure of the respondent’s title was never pleaded in the appellants’ pleadings and only came up during trial. Counsel contended that the issue before the trial court related to the question of ownership and not tenure.
24. On whether the trial court erred in rendering a judgment in favour of the respondent, counsel submitted that the 1st appellant failed to prove the allegation of fraud against the respondent. Counsel added that the 1st appellant failed to prove that the suit property had been gifted to her intervivos. Counsel for the respondent contended that the respondent had demonstrated that she acquired the suit property through purchase. It was the position of counsel for the respondent that the trial court did not err in making findings in favour of the respondent.
25. On the issue of costs, counsel cited section 27(1) of the *Civil Procedure Act* and urged the court to dismiss the appeal and award the respondent costs of the appeal.

Analysis and Determination

26. I have read and considered the original record of the trial court; the record filed in this appeal; the grounds of appeal; and the parties’ respective submissions. I have also considered the relevant legal frameworks and jurisprudence. The appellants itemized 16 grounds of appeal. In their subsequent written submissions, they condensed the 16 grounds of appeal into six issues. On her part, the respondent identified seven issues.
27. Taking into account the 16 grounds of appeal and the issues identified in the parties’ written submissions, the following are, in the view of this court, the five key issues that fall for determination in this appeal: (i) Whether this appeal is fatally defective by dint of the fact that the appellants failed to join the Land Registrar as a party to the appeal; (ii) Whether the 1st appellant acquired an interest in the suit property through gifting intervivos; (iii) Whether the 1st appellant proved fraud and collusion against



the respondent and the Land Registrar as pleaded in the defence and counterclaim; (iv) Whether the trial court erred in entering judgment in favour of the respondent; and (v) What orders should be made in relation to costs? Before I dispose the five issues, I will briefly outline the principle that guides this court when exercising jurisdiction as an appellate court.

28. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Kesbar Shiani* (2013) eKLR as follows:-

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”

29. The above principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse 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.”

30. The first issue is whether this appeal is fatally defective by dint of the fact that the appellants failed to join the Land Registrar as a party to the appeal. This is a jurisdictional issue. It is the position of the respondent that this appeal is fatally defective because the appellants failed to join the Land Registrar as a party to the appeal.
31. In the trial court, the respondent in this appeal sued the two appellants as 1st and 2nd defendants respectively. Upon being served with court summons and pleadings, the 1st appellant [Lucy Wanjiru Njihia] filed a defence and a counterclaim. In her counterclaim, she sued Shelmith Wanja Njoroge [the respondent in this appeal] as the 1st defendant in the counterclaim. She sued the Land Registrar as the 2nd defendant in the counterclaim.
32. In her pleadings, the 1st appellant pleaded that the two defendants in the counterclaim [Shelmith Wanja Njoroge and the Land Registrar] had colluded to facilitate obtention of a title to the suit property in the name of the respondent. Among other reliefs, she sought a declaration to the effect that the title issued in the name of the respondent was obtained fraudulently and illegally and that the same should be cancelled. In addition, she sought costs of the counterclaim against the two defendants.
33. The Land Registrar subsequently filed a defence dated 27/11/2019 in which he denied the allegations of fraud and collusion. It was the case of the Land Registrar that he caused the land to be registered in the name of the respondent on the basis of documents that were presented to him. During trial, the Land Registrar testified as DW4. He denied collusion with the respondent. He further testified that no complaint had been made to his office relating to the impugned registration.
34. It does emerge from the record of appeal and from the original memorandum of appeal that, aggrieved with the Judgment of the trial court, the two appellants brought a joint appeal in which they identified one respondent, Shelmith Wanja Njoroge. They did not name the Land Registrar as a party to the appeal. There is nothing on record indicating that they intended to serve or served the Land Registrar with the Memorandum of Appeal or the Record of Appeal.



35. The appellants' prayer before this court is as follows:

“Reasons Wherefore the appellant prays that the lower court judgment be set aside and judgment be in favour of the appellants as per the 1st appellant counterclaim dated 11th September 2019.” [sic]

36. It is clear from the foregoing that the appellants want this court to find that the Land Registrar colluded with the respondent and fraudulently procured the impugned title. They further want the court to enter judgment against both the respondent and the Land Registrar in terms of the orders that were sought in the counterclaim. They have, however, neither joined the Land Registrar as a respondent to his appeal nor served him with the record of appeal. Put differently, they want the Land Registrar to be condemned unheard.

37. Is that possible? My answer to this question is in the negative. Our courts have umpteen times emphasized that the right to be heard is central in our legal system. The Court of Appeal emphasized this principle in *James Kanyिता Nderitu & Another v Marios Philotas Ghikas & Another* (2016) eKLR in the following words:-

“The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.”

38. In this appeal, this Court has been invited to exercise jurisdiction as a first appellate court. The guiding principle when exercising jurisdiction as a first appellate court is that the court is expected to consider the evidence that was placed before the trial court, evaluate the evidence and draw its own conclusions. That jurisdiction can only be properly exercised when all the parties who participated in the trial have been given the opportunity to be heard by the first appellate court.

39. Confronted with a scenario similar to the circumstances in this appeal, the Court of Appeal in *Onjula Enterprises V R. K. Sumaria* [1986]eKLR found that the appeal was fatally defective and struck it out. Regrettably, that is the fate that befalls this appeal.

40. For the above reasons, this court entirely agrees with the respondent that failure to join the Land Registrar as a respondent or, at the very least, serve him with the record of appeal, renders this appeal fatally defective in that this court cannot exercise its jurisdiction as a first appellate court and grant the reliefs sought in the appeal in the absence of the Land Registrar who is directly affected by the appeal.

41. The appeal having been adjudged fatally defective and rejected on jurisdictional grounds, the court will not deal with issues relating to the merits of the appeal. The court will instead down its tools in tandem with the principle laid down in *Owners of Motor Vessel “Lillian S” Vs. Caltex Oil (Kenya) Ltd* [1989]eKLR.

42. The result is that this appeal is struck out. There being no proper basis why the court should depart from the general principal in section 27(1) of the *Civil Procedure Act*, the appellants shall bear costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 15TH DAY OF MAY 2023

B M EBOSO

JUDGE

In the Presence of: -



Mr Wachira for the Appellant

Mr Rukwaro for the Respondent

Court Assistant: Hinga/Osodo

